(25,719)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 889.

THE CITY OF ENGLEWOOD, PLAINTIFF IN ERROR,

vs.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1917.

* * * * * * *

1–5 *Complaint.*

The plaintiff, complaining of the above named defendant, alleges—

First. That the plaintiff is a city of the second class, created and organized under and pursuant to the laws of the State of Colorado, and is, and during all of the times hereinafter mentioned was, a body politic, so under the laws of the State of Colorado created, and that upon the 28th day of December, A. D. 1906, and for some time subsequent and prior thereto, the plaintiff was a duly incorporated town, created under and pursuant to said laws, and thereafter and during the year 1909, said town by virtue of and pursuant to the statute of the State of Colorado, became and ever since has been, as aforesaid, a city of the second class.

Second. That the defendant is a corporation, duly created, organized and exist- and doing business under and pursuant to the statute of the State of Colorado, and is now the owner of a certain electric railway, extending from the intersection of Hampden Avenue and Broadway, in the said City of Englewood, extending through said city, and continuing to the Town of Littleton, in the County of Arapahoe, and State of Colorado, and the said defendant corporation is, and for some time last past has been engaged in the operation of said railway as a common carrier, conveying passengers for hire in its cars, propelled upon its said railway by electricity, to
6 and fro, over and upon its said line of railroad.

Third. Plaintiff further alleges that while the plaintiff was an incorporated town as aforesaid, and upon the 6th day of December, A. D. 1906, the said town, by and through its Board of Trustees, did then by Ordinance duly grant unto Edmund D. Davis, Hampden H. Shepperd, Royal J. Leach, James E. Maloney and Daniel Prescott, their successors or assigns, the right to construct, maintain and operate a street railway, in the Town of Englewood, County of Arapahoe and State of Colorado, and did then and there grant unto the said individuals, for a period of thirty years from the date of said franchise, a right of way over, on and across certain of the streets, alleys, avenues and public ways, of the said Town of Englewood, and upon the date last aforesaid, the said town, through its said Board of Trustees duly adopted and passed a certain Ordinance, which is in words and figures as follows, to-wit:

An Ordinance Granting to Edmund D. Davis, Hampden H. Shepperd, Royal J. Leach, James E. Maloney, and Daniel Prescott, their successors or assigns, the right to construct, maintain, and operate a street railway in the Town of Englewood, County of Arapahoe and State of Colorado, and granting them the right of way over, along and across certain streets, alleys, avenues, and public highways of the Town of Englewood.

Be it enacted by the Board of Trustees of the Town of
7 Englewood.

Sec. 1. That a franchise and right of way be, and the same is hereby granted to Edmund D. Davis, Hampden H. Shepperd, Royal J. Leach, James E. Maloney and Daniel Prescott, and to their successors or assigns, to locate, build, construct, operate and maintain a single or double track street railway, with all suitable switches, turnouts, crossings, crossways, loops, "Y's," poles, overhead and underground wires, and such other wires and appliances as may be necessary, proper or convenient therefor, over, along and upon Broadway from the intersection of Hampden (formerly Sheridan) Avenue, to-wit: a point at or near the center of the northern boundary line of section three (3) township five (5) south of range sixty-eight (68) west of the sixth (6) principal meridian, in the County of Arapahoe, and State of Colorado, thence southerly upon and along said Broadway of the southern boundary line of the Town of Englewood, to-wit,—a point at or near the center of section ten (10), township five (5) south, of range sixty-eight (68) west of the sixth (6) principal meridian, in said County and State, with the right to cross such streets, alleys and public highways as intersect said Broadway, between said northern and southern termini above designated and set forth, and to connect said street railway at either or both of said termini with any line or lines of railway as said grantees, their successors or assigns may elect, and with the right, privilege and authority to connect said railway, its wires, property and substations by means of poles, wires and other appliances, with the power house and car barns of said grantees, their suc-
8 cessors and assigns, whereever situate, and to operate said railway lines by electricity in any of its forms or methods, or be (by) any other mechanical motive power now known or used, or which may hereafter be discovered or used, except steam. The rights and privileges herein and hereby granted shall cover and confer the right to transact passenger, mail, baggage, express and freight business, provided that no freight shall be transported except between the hours of ten (10) P. M. and six-thirty (6:30) A. M., except materials for construction purposed by said railway.

Sec. 2. The tracts of said railway may be either single or double tracts at the option of the grantees, their successors or assigns, of any gauge which said grantees, their successors or assigns may elect, and may consist of three (3) rails to each track to accom-odate cars of different gauges, if said grantees their successors or assigns so elect. Said tracts shall be laid as nearly as practicable in the center of the street.

Sec. 3. In the construction and maintenance of said railway track, the upper surface of the rails shall be laid on a level with the adjacent surface of the street. If at any time a change of grade is made in any street, now at grade at the time of construction of said railway tracks, or if any street occupied by said grantees, their successors or assigns is thereafter changed in its grade, the grantees herein named, their successors or assigns shall change said tract at their own expense so as to conform to the established grade. After the construction of said tracts, conduits or applicances, the street or streets shall be properly restored to as good condition as when the work of construction begun; and thereafter the grantees, their successors or assigns shall at all times maintain the portions of streets, alleys and places occupied by the tracts of said railway, and the spaces between and for two (2) feet on each side thereof in as good condition for use as the other portions of the same streets shall be kept by the town. During the construction of said railway, not more than two thousand (2,000) linear feet of street shall be torn up at any one time, and no such section for longer than thirty (30) days at one time without the consent of the Board of Trustees of the Town of Englewood.

Such street shall be safely guarded at all times during the construction work without the expense to the Town of Englewood. All construction work shall be done in accordance with the reasonable requirements of the Board of Trustees of the Town of Englewood.

Whenever said railway lines shall cross or run along any gutter, ditch or waterway, said grantees shall construct and maintain the necessary bridges and conduits therefor, without expense to the Town of Englewood. The rights herein granted shall not be contrued (construed) to interfere with any irrigating or drain ditches, or any gas, sewer or water mains, or other franchises in said town, or prevent free access thereto.

Sec. 4. The poles used for suspending wires and cross-arms to supply electric current for the use of said railway shall be of good substantial material, suitable for the purpose and shall be placed at the sides of said streets as near as may be at the curb line thereof.

No wires shall be suspended at a height of less than eighteen (18) feet above the surface of the street, now (nor) shall the same interfere with the wires of existing telegraph, telephone or electric companies.

Sec. 5. The grantees of this franchise, their successors or assigns shall not run cars upon said tracks, within the town limits of the Town of Englewood at a rate of speed greater than fifteen (15) miles per hour, and shall conform to all general police ordinances now existing or that may be enacted hereafter concerning the health, convenience and safety of the passengers upon said railway and the inhabitants of the Town of Englewood and the public. And full power is hereby reserved concerning the legislative and police ordinances in respect to the streets, alleys, avenues, public places and ways of said town.

Sec. 6. Said grantees, their successors or assigns shall have the

right to charge persons riding on said cars, five (5) cents for a single passage between said terminal, provided that children under six (6) years of age, when accompanied by a paying passenger, shall be carried free of charge; and children over six years of age and
11 under twelve (12) years of age shall be carried at half fare, and half fare tickets shall be on sale by the conductor on all cars; and provided further, that said grantees, their successors or assigns, shall provide by reasonable regulation, for the sale of coupon tickets which shall entitle passengers taking passage on the cars of said grantees their successors or assigns going north on said Broadway at or north of Quincy Avenue (formerly called Breen Avenue) to be transported the same as regular Tramway passengers without extra fare upon the cars of the Denver City Tramway Company at Hampden Avenue (formerly called Sheridan Avenue), and also, entitling passengers going south on the cars of the Denver City Tramway Company, to be transported upon the cars of said grantees to the intersection of any street between Hampden Avenue (formerly called Sheridan Avenue) and Quincy (formerly called Breen Avenue) the latter inclusive avenue without additional fare upon presentation of said coupon ticket.

Sec. 7. The construction of said railway shall commence within six (6) months from the passage of this ordinance, and said railway shall be completed and in actual operation on or before the expiration of one (1) year from and after its passage. If said grantees, their successors or assigns, shall fail to comply with the requirements of this section, the Board of Trustees of the Town of Englewood may declare all the rights of the grantees, their successors or assigns on such portion of said streets as shall not have been occupied,
12 built upon and operated as in this ordinance provided, for-
(annulled)
feited and annuled, but, no rights shall be forfeited or annulled, or in any way affected, upon any street, alley, avenue or public way upon which said construction shall have been completed and be in regular operation. If said grantees their successors or assigns, without fraud, neglect or connivance on their part, shall in any manner
(carrying)
be hindered delayed or prevented from carring out said construc-
(by)
tion, be any bona fide legal proceeding, or by strikes or any other matter or thing beyond the control of said grantees, their successors or assigns, the time during which work of construction, shall be necessarily so delayed hindered or prevented, shall be added to the time within which said construction is to be completed according to the terms of this grant of franchise.

Sec. 8. Said grantees, their successors or assigns shall pay the cost of publication and all other expenses insidental (incidental) to the granting of this franchise which might otherwise be chargedable (chargeable) to the town of Englewood.

Sec. 9. Within ten (10) days after the passage and approval of this ordinance, said grantees, their successors or assigns, shall file with the clerk and recorder of the Town of Englewood a bond in the

penal sum of Five Thousand (5,000) Dollars to be executed with good and sufficient sureties, to be approved by the Board of Trustees of Englewood in favor of the Town of Englewood to the effect that said grantees, their successors or assigns, will begin work upon said railway within the time hereinbefore stated, and that said
13 railway will be completed between the termini hereinbefore designated, and in the actual operation on or before the expiration of one (1) year from and after the date of the passage of this ordinance.

Sec. 10. Said grantees, their successors or assigns shall regularly operate said railway in said town of Englewood, and shall give the citizens of said town of Englewood and the public at leat (least) one hour service each way between the hours of six (6) A. M. and ten (10) o'clock P. M. of each day.

Sec. 11. Said grantees their successors or assigns shall upon the acceptance of the franchise herein granted file with the Town Clerk and Recorder of said Town of Englewood, a bond in the penal sum of $10,000 to be executed with good and sufficient sureties to be approved by the Board of Trustees of said town in favor of said town, conditioned that said Town of Englewood shall be saved harmless from any damages arising out of the exercise by said grantees, their successors or assigns or any of the rights herein conferred.

Sec. 12. The terms and provisions of this ordinance, together with all rights, privileges and franchises hereby granted, and the obligations hereby imposed, shall inure and apply to said grantees and to their successors and assigns.

Sec. 13. This franchise and grant of right of way and privileges is limited in time to thirty (30) years from the date of the passage of this ordinance.

That prior to or at the time of making application for
14 the foregoing ordinances, the grantees therein named, their successors or assigns, will file with the Board of Trustees of said twon (town), the written consent of the owners of a majority of the feet frontage on each and every block of said Broadway, between the northern terminus of the said railway as herein above set forth, and Quincy Avenue (formerly called Breen Avenue); and will also file the written consent of the owners of a majority of the feet frontage on said Broadway, between said Quincy Avenue and the southern terminus of said railway as hereinabove set forth.

Dated at Englewood, Colorado 6th day of December, A. D. 1906."

And plaintiff alleges that thereafter the defendant, by transfers, deeds and assignments, duly made, executed and delivered to it by the said individuals named in said ordinance, and to whom said franchise was granted, duly acquired and succeeded to all of the rights, privileges, franchises and properties created by and under the terms of the said Ordinance, and succeeded to all of the duties, obligations and conditions imposed by the terms thereof, and pursuant to said Ordinance, and the franchise created thereby, did construct and equip the said railway, and has ever since and now does, as aforesaid,

operate the same as a common carrier for hire under and pursuant to the terms and conditions of the said Ordinances.

15 Fourth. That said section six of said Ordinance provides that the said grantees and their successors shall have the right to charge persons riding on the cars of said company, five cents for a single passage between the termini of said road; and also provides, that said grantees and the said defendant and their successors, shall provide by reasonable regulation for the sale of coupon tickets, which shall entitle passengers taking passage on the cars of said *said* company going north on Broadway, at or north of Quincy Avenue (formerly called Breen Avenue) to be transported the same as regular tramway passengers without extra fare upon the cars of Denver City Tramway Company, at Hampden Avenue (formerly called Sheridan Avenue); and also, entitling passengers going south on the cars of The Denver City Tramway Company to be transported upon the cars of the defendant to the intersection of any street between Hampden Avenue (formerly called Sheridan Avenue), and Quincy Avenue (formerly called Breen Avenue), the latter inclusive avenue without additional fare upon presentation of the said coupon ticket.

That at the time of the passage of said Ordinance, and the granting of said franchise by the grantors of the said defendant, the Denver City Tramway Company was engaged in operating a street railway as a common carrier between the City of Denver, and the said Hampden Avenue, at the intersection of said Hampden Avenue and Broadway, in the said City of Englewood, and that thereafter the defendant company did, until on or about the 28th day of Octo-

16 ber, A. D. 1914, substantially comply with the terms and conditions of said section six, and for some years thereafter did in fact provide for those seeking passage upon the cars of the said The Denver City Tramway Company, without extra charge as provided in section six of said Ordinance, but notwithstanding the terms and conditions of said section six, and the duties and obligation thereby imposed upon the defendant, the said defendant company did on or about the date last aforesaid, and in violation of its said contract so entered into in the said Ordinance, refused either to provide coupon tickets to the citizens of the said city, and other- desiring to be transferred from or to the street intersections named aforesaid, from or to the cars of the said The Denver City Tramway Company, and refused and still does refuse to transfer said passengers to or from any of the said street intersections, without the payment of the sum of five cents in addition to the fare collected by the said The Denver City Tramway Company.

That citizens of the said City of Englewood have repeatedly demanded that the said defendant company either furnish said coupon tickets, pursuant to the terms and conditions of said section six of said ordinance, or transfer them from and to the cars of the said The Denver City Tramway Company from or to any of the said street intersections named in said section six, but notwithstanding said repeated demands, the defendant has refused, and now does refuse to comply with the said terms and conditions of the said

17 Ordinance, and especially of said section six, all to the great and irreparable injury to the inhabitants and citizens of the

said City of Englewood, and to the great and irreparable injury and damage of the plaintiff.

Fifth. That in order to enforce the rights of the inhabitants and citizens of the plaintiff, under and pursuant to the terms of said section six of said Ordinance, *excepting* by this proceeding, a multiplicity of suits and actions would be required, and the citizens of said City have no speedy or adequate remedy at law in order to enforce the contract contained in said Ordinance, and especially that portion thereof contained in said section six.

Wherefore plaintiff prays judgment:

First. That a temporary writ of injunction issue out of this Court restraining the defendant, its officers, agents, servents (servants) and employees from violating the terms and conditions of said section six of said Ordinance, and restraining them and each of them from further refusing to provide by reasonable regulation for the sale of coupon tickets, which shall entitle passengers, taking passage on the cars of the defendant going north on said Broadway at or north of Quincy Avenue (formerly called Breen Avenue) to be transported the same as regular tramway passengers, without extra fare upon the cars of the said The Denver City Tramway Company, at Hampden Avenue (formerly called Sheridan Avenue); and, also,
entitling passengers going south on the cars of the said The
18 Denver City Tramway Company to be transported upon the
cars of the said defendant at the intersection of any street between Hampden Avenue aforesaid, and Quincy Avenue, without additional fare upon presentation of the said coupon tickets; and restraining the defendant, its officers, agents, servants and employees from demanding, receiving or collecting of passengers going north a fare for being transported over the line of the sais (said) defendant company to the terminus of the Denver City Tramway Company in the City of Englewood, in addition to the fare of five cents which is thereafter collected by the Denver City Tramway Company for transportation upon its line; and likewise, restraining them from demending (demanding), receiving or collecting an additional fare of five cents for the privilege of being transported from the cars of the said The Denver City Tramway Company from the said Hampden Avenue to the street intersection named aforesaid, within the said City of Englewood.

Second. That upon final hearing, the said injunction be made perpetual.

Third. For such other and further relief as may be equitable and for costs.

CRUMP & ALLEN,
R. H. BLACKMAN,
Attorneys for Plaintiff.

19–32 STATE OF COLORADO,
County of Arapahoe, ss:

James O'Brien, being first duly sworn, upom (upon) oath deposes and says—that he is the Mayor of the City of Englewood, the plain-

tiff above named; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge.

JAMES O'BRIEN.

Subscribed and sworn to before me this 6th day of November, A. D. 1914.

[SEAL.] ERASTUS A. TUTTLE,
Notary Public.

My commission expires June 1st, 1915.

* * * * * * *

33 *Order.*

This cause came on for hearing before the undersigned Judge of the District Court, sitting at Littleton, in the County of Arapahoe, upon the 13th day of November, A. D. 1914, the plaintiff appearing by its attorneys, Roy H. Blackman and Crump and Allen, and the defendant by its counsel, W. H. Caley, upon the application of the plaintiff for a temporary writ of injunction as prayed for in the bill of Complaint on file. The defendant filed and presented for consideration its demurrer to the said complaint, and said demurrer having been fully considered by the Court, upon argument of counsel, the same was in all respects denied and overruled, to the overruling of said demurrer, the defendant by counsel duly excepted.

Whereupon, plaintiff moved the Court for an Order granting a temporary writ of injunction as prayed for in the complaint. The defendant having filed no Answer or denial of any of the Allegations of fact contained in the complaint, the Court is of the opinion that the plaintiff is entitled to the temporary relief prayed for in this application, and the Court finds—that under the terms, conditions and provisions of Section Six of that certain Ordinance adopted by the town, now city, of Englewood, upon the 6th day of December, A. D. 1906, the plaintiff, in its capacity as a body corporate, has a right to a continued enforcement of all of the terms and conditions contained and set forth in the said section.

34 Wherefore, it is considered, ordered, adjudged and decreed by the Court:

That until the further order of the Court, the defendant, The Denver & South Platte Railway Company, its officers, agents, servants and employees, and each of them, are hereby restrained and *ad*joined from violating any of the terms and conditions of said Section Six of said Ordinance, and they and each of them are hereby fully restrained and enjoined from refusing to provide by reasonable regulation for the sale of coupon tickets, which shall entitle all passengers desiring to take passage on the cars of the defendant company, going north upon Broadway in said City of Englewood, at points at or north of Quincy Avenue in said City, to be transported over its line of railway and to be transferred and transported upon

the cars of The Denver City Tramway Company at Hampden Avenue in said City of Englewood, without the payment to the said The Denver City Tramway Company or to the defendant, of any extra fare or charge.

And, also, from refusing to provide by reasonable regulations for the sale of coupon tickets, which shall entitle passengers going south upon the cars of the said The Denver City Tramway Company to be transferred at said Hampden Avenue, and thence transported upon the cars of the said defendant company to the intersection of any street between the said Hampden Avenue and the said Quincy Avenue, inclusive, without the payment of additional fare or cost to said defendant company, upon presentation of said coupon
35 tickets; and the said defendant its officers, agents, servants and employees, are hereby each and all fully restrained and enjoined from demending (demanding), receiving or collecting from passengers going north upon cars of defendant company, any extra fare above the sum of five cents (5¢) for being transported over the line of the said defendant company to the terminus of the said the Denver City Tramway Company in the City of Englewood, for the right and privilege of being thus transported to the cars of the said The Denver City Tramway Company, and being thence transported without further charge.

And the said defendant, its officers, agents, servants and employees are likewise fully restrained and enjoined from demanding receiving or collecting any additional fare from any person whomsoever for the privilege of being transferred from the cars of the said The Denver City Tramway Company at said Hampden Avenue, and thence transported upon the cars of the defendant company from the Hampden Avenue to any street intersection between the said Hampden Avenue and the said Quincy Avenue, in the said City of Englewood, inclusive.

And the said defendant company, its officers, agents, servants or employees are hereby required and commanded in all respects to comply with the terms and conditions of said section six of said Ordinance, and in some proper and reasonable way to provide means whereby all persons who have taken passage upon the cars of the defendant company between Quincy Avenue and Hampden Avenue in the City of Englewood, going north, to be transferred and
36–41 transported upon the cars of the said The Denver City Tramway Company, without any further charge or fare than the sum of five cents for such continuance passage. And also, in some proper and reasonable way to provide means whereby all passengers going south upon the cars of the said The Denver City Tramway Company shall be transferred to the cars of the defendant company, thence transported without extra charge to any street intersection in the City of Englewood between the said Hampden Avenue and Quincy Avenue, inclusive.

It is further ordered: That a writ of injunction issue out and under the seal of this Court pursuant to the terms and conditions of this Order, and as provided by law.

Done at Golden, Colorado, this 17" day of November, A. D. 1914.
By the Court:

H. S. CLASS, *Judge.*

* * * * * * *

42 Be it remembered, That heretofore and on the 21st day of November A. D. 1914 the defendant herein The Denver and South Platte Railway Company by its Attorney W. H. Caley Esq. filed in the office of the Clerk of this Court an Answer in this action which Answer is in words and figures as follows to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

No. 848.

THE CITY OF ENGLEWOOD, Plaintiff,

VS.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Defendant.

43 *Answer.*

Comes the defendant above named and answering the Complaint of the plaintiff, alleges:

1st. That it denies each and every of the allegations in the complaint made, except those allegations hereinafter specifically admitted.

2nd. That defendant admits those allegations contained in the first paragraph of the complaint.

3rd. That defendant admits those allegations contained in the second paragraph of the complaint.

4th. The defendant admits those allegations contained in the third paragraph of the complaint.

5th. The defendant admits those allegations contained in the 4th paragraph of said complaint, except as herein modified, that is to say, the defendant denies that it did after the granting of the franchise alleged in the said complaint, and until about the 28th day of October, A. D. 1914, substantially comply with the terms and conditions of the said Section 6, as alleged in complaint, and the defendant denies that it did for some years thereafter in fact, provide for those seeking passage upon the cars of the said defendant company, coupon tickets which entitled the passengers to be transferred to and from the cars of the said The Denver City Tramway Company, without extra charge as provided in Section 6 of said Ordinance and the defendant denies that it refused to provide coupon tickets to the Citizens of said City and others desiring to be
44 transferred from or to the street intersection named aforesaid, from or to the cars of the said The Denver City Tram-

way Company, and alleges that since Oct. 28th 1914 it refused and still does refuse to transfer said passengers to or from any of the street intersection- without the payment of the sum of five (5) cents in addition to the fare collected by the said The Denver City Tramway Company.

6th. The defendant denies that the citizens of the City of Englewood have repeatedly demanded or demanded at all of the said defendant company that it furnish coupon tickets pursuant to the terms and conditions of the said Section of said Ordinance, but alleges that the said citizens have demended (demanded) of the said defendant company since the said 28th day of October, A. D. 1914, that the said defendant company transfer them from and to the cars of The Denver City Tramway Company from or to any of the street intersections named in said Section 6, and the defendant alleges that it has refused to transfer the said citizens of said City of Englewood, as aforesaid, and denies that it has refused to comply with the said terms and conditions of the said Ordinance and specifically with said Section 6 thereof, and the defendant denies that the citizens or inhabitants of the City of Englewood or the plaintiff herein, has suffered great or irrepairable (irreparable) or any injury by reason of anything done or refused to be done by this defendant.

7th. The defendant denies that for the plaintiff to enforce any rights of any inhabitants and citizens of Englewood under
45 and pursuant to the said Section 6 of the said ordinance, a multiplicity of suits and actions are necessary or required, and the defendant denies that the said inhabitants and citizens or the plaintiff herein have no speedy or adequate remedy at law in order to enforce the said alleged contract set out in said Section 6 of said ordinance.

Further answering the complaint of the plaintiff, this defendant alleges:

1st. That ever since the passage of the said ordinance aforesaid, set out in the complaint and until the 28th day of October, A. D. 1914, this defendant had issues given and tendered to the citizens of Englewood and to all persons seeking passage on the cars of this defendant company, between the points complainted of, free service, free tickets, frank, and free passes and other gratuities and transfers entitling the said passengers seeking passage on the line of this defendant company, between points within this state free transportation on cars of the Defendant Company. And this defendant alleges that ever since the passage of the said ordinance aforesaid, it has provided by reasonable regulation, or otherwise, for the sale of coupon tickets and the inhabitants and citizens of Englewood nor any persons whatever have never demanded of this defendant company that it sell to them or to any of them or to any person for them any coupon ticket entitling them to be transported upon the lines of The Denver City Tramway Company, the same as regular tramway passengers between the points mentioned in the said
46 Complaint, as provided in said Section 6 of the said ordinance set out in the complaint.

2nd. The defendant alleges that this defendant has sought to make

arrangements with The Denver City Tramway Company for the transfer of the passengers taking passage upon the lines of this defendant company between points set out in the complaint and mentioned in Section 6 of the Ordinance and the only provision that this defendant could make for such transportation was, has been, and now is that the Denver City Tramway Company shall receive five (5) cents from the defendant company for all passengers or persons transported by it upon transfers issued by this defendant company to passengers taking passage upon its line at the points mentioned in the complaint and specifically set out in Section 6 of said ordinance, and that pursuant to said arrangements with The Denver City Tramway Company, this defendant has been required to and did until the 28th day of October, A. D. 1914, issue, give and tender free service, free ticket, frank and free pass and other gratuities giving to the said persons so taking passage on the said lines between the said points, free transportation upon the lines of this defendant company within the State of Colorado.

3rd. This defendant alleges that on the 28th day of September, A. D. 1914, pursuant to the provision of law in such case made and provided it did file with the Public Utilities Commission of the State of Colorado, its schedule of rates as is provided by law, that the said schedual (schedule) of rates so filed were not suspended by the said Public Utilities Commission herein upon its own motion or upon the complaint of others for a period of thirty days; and that
47 thirty days expired from the time of the filing the same and from the 28th day of September, A. D. 1914; and until the 28th day of October, A. D. 1914; and thereupon and pursuant to law, the said rates did on the 28th day of October, A. D. 1914, go in effect and become and now are the established effective rates, fares and charges, practices, rules and regulations of this defendant company.

4th. That this defendant company is a street railway company engaged in passenger transportation and as such is, under the laws of the State of Colorado, a Public Utility.

5th. That this defendant company, ever since the 28th day of October, A. D. 1914, and until the temporary order of this Court, has complied with the established rules and regulations and rates of this company as affixed by law and by the acts of the Public Utility Commission in the State of Colorado, but this defendant company alleges that since the issuing of the said temporary order by this Honerable (Honorable) Court, this defendant has violated the said rates and regulations so established as aforesaid and ever since the temporary order of this Court, had violated the said rules, rates and regulations aforesaid, and laws of the State of Colorado, in such case made and provided, and this defendant alleges that The Denver City Tramway Company requires that the defendant pay to them five (5) cents for every passenger taking passage on the cars of that company between the points aforesaid and mentioned in the said ordinance and especially section 6 thereof, that shall
48 take passage upon their cars and tender to them the transfers heretofore mentioned, issued by this defendant company,

and this defendant alleges further that The Denver City Tramway Company, requires of this Defendant Company that it transport passengers taking passage on the cars of the Denver City Tramway Company, who demand of them transfers to the cars of this company, that this company transport the said passengers or passenger upon its line free of charge and requires of this company that the said transfer so issued by The Denver City Tramway Company shall indirectly operate as a free pass, free service, free ticket, frank and other gratuity, entitling the said passengers aforesaid to ride upon the cars of this defendant company free and to be transported upon the cars of this defendant company, between points within the State, free of charge and as a gratuity.

6th. This defendant alleges further that all persons taking passage upon either the lines of this defendant company or upon the lines of The Denver City Tramway Company, and seeking transportation upon the lines of the other company than that on which they took passage rides upon the cars of this defendant company upon a free ticket, frank, free pass and other gratuity and thereby procures free transportation for themselves between points within this State.

7th. This defendant alleges that the citizens of the City of Englewood have never demanded from this defendant company that they sell to them coupon tickets of any description whatever, and have never demanded of this defendant company that they furnish
49 to them coupon tickets pursuant to said Section 6 of said ordinance, set out in the complaint and this defendant alleges that the said persons so seeking passage as aforesaid have always demanded and do now demand since the issuance of the said temporary order made by this Honerable (Honorable) Court have demanded from this defendant company and from The Denver City Tramway Company transfers entitling them free transportation upon the cars of this defendant company.

8th. This defendant alleges that ever since the 28th day of October, A. D. 1914, and until the issuance of the temporary order by this Honorable Court, the defendant company and The Denver City Tramway Company have refused to directly or indirectly issue, give or tender any free service, ticket, frank, free pass or other gratuity or free or reduced rate transporation (transportation) for passengers between poibts (points) within the State of Colorado.

9th. This defendant alleges that the inhabitants and citizens of the City of Englewood have not suffered any great, irrepairable (irreparable) injury or damage or any injury or damage whatever growing out of the matters anf (and) things alleged in the Complaint and allege that the Citizens and inhabitants and the plaintiff herein cannot suffer any great or irrepairable (irreparable) injury or damage by reason of said matters set out in the Complaint.

10th. The defendant alleges that a multiplicity of suits and prosecutions will result against this defendant company, and
50 against the Denver City Tramway Company and against all persons whatever, including inhabitants and citizens of the City of Englewood that may seek transportation upon the lines of the Denver City Tramway Company or upon the cars of this de-

fendant company who shall ask for and receive transfers and free transportation as prayed for in the complaint and this defendant alleges that a great multiplicity of suits and prosecutions will result to all agents employees and representative- of this defendant company, and of the agents and employees of The Denver City Tramway Company, if they are permitted to directly or indirectly issue, give or tender any free service, free ticket, frank, free pass or other gratuity entitling passengers to free transportation between points within this state, and that all of the persons aforesaid, and the said The Denver City Tramway Company, and the defendant company will be subject to a great multiplicity of suits and prosecutions.

11th. This defendant alleges that the plaintiff herein and all of the inhabitants and citizens of the City of Englewood and all persons who may be injurned (injured) or may claim to be injured by any of the acts or things set out in the complaint wherein this defendant or The Denver City Tramway Company refuses to issue free transportation or wherein this defendant company or The Denver City Tramway Company refuses to provide for the sale of coupon tickets between points within this State that indirectly provides for free service, free ticket, frank, free pass and other gratuity entitling passengers to transportation between the points within this State, have a plain, speedy and adequate remedy at law under the Public
51 Utilities' Bill of the State of Colorado, being an act concerning Public Utilities creating a Public Utility Commission, prescribing (prescribing) its powers and duties and repealing certain acts and parts of acts in conflict therewith.

Wherefore this defendant prays that this action be hence dismissed with costs to the plaintiff.

W. H. CALEY,
Attorney for Defendant.

STATE OF COLORADO,
County of Arapahoe, ss:

R. C. Larkin, being first duly sworn on oath deposes and says that he is the Sec. & Gen'l Manager of the above named defendant company, that he makes this affidavit in this behalf: that he has read the foregoing Answer, knows the contents thereof, and that the matters and things therein stated are true of his own knowledge and belief.

(Signed) R. C. LARKIN.

Subscribed and sworn to before me this 20th day of November, A. D. 1914.

My Commission Expires Feb. 20, 1915.

[SEAL.] IDA C. JONES,
Notary Public.

52 Be it remembered that heretofore and on the third day of December, A. D. 1914, the plaintiff herein The City of Englewood by its Attorneys Crump and Allen, and R. H. Blackman, Esqs.,

filed in the office of the Clerk of this Court a demurrer in this action which demurrer is in words and figures as follows to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

No. 848.

THE CITY OF ENGLEWOOD, Plaintiff,

vs.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Defendant.

53 *Demurrer.*

Comes now the plaintiff in the above entitled cause, by Crump & Allen and Roy H. Blackman, its attorneys, and demurs to the answer herein filed, and particularly to that portion of said answer designated "a further answer", on page two thereof, and as grounds of said demurrer, state,—

First. That said further answer fails to state facts sufficient to constitute a defense to the complaint herein filed, in this to-wit,—

a. That it affirmatively appears from said further answer, that said section six of the ordinance set forth in the complaint herein, has been from its passage until the present time, construed by both parties hereto, to mean, that the defendant will provide for the carriage of passengers between the points designated in said section six, who come from or desire to travel upon the lines of the Denver City Tramway Company, without extra fare; and that the manner of providing such transportation, was not considered by the parties hereto as at all material in carrying out the intent of said ordinance.

b. That it affirmatively appears from said further defense that it is perfectly possible and feasible for the defendant to comply with the spirit and intent of said section six, either by the issuance of said coupon tickets or otherwise, and to so provide for the transportation of passengers, between the points named, without any extra fare, other than that charged on the line of the said The Denver City Tramway Company.

c. That it is immaterial, and constitutes no defense to the
54 cause of action in the complaint herein, that the defendant is unable to receive any compensation for carrying said passengers, without charging any extra fare for transportation over its line of railway, through the town of Englewood.

d. That it is immaterial, and does not constitute a defense to the cause of action herein stated, that the defendant is unable to make a profit or make any compensation whatsoever for carrying the passengers, included within the terms of said section six of said ordinance, over its line of railway in accordance with the provisions of said section six of said ordinance.

e. That it is immaterial whether or not the defendant filed with the Public Utilities Commission of the State of Colorado, its schedule of rate as in said answer set forth, as the filing of said schedule of rate is not a defense to the cause of action set forth in the complaint herein, alleging a violation of the terms and provisions of said section six of the ordinance and contract between the plaintiff and the defendant, and because the rates and duties of the defendant were permanently fixed by the terms of said section six.

f. That it is immaterial and does not constitute any defense herein that the defendant has complied with the schedule of rates therein referred to, since the 28th day of October, A. D. 1914 and until the issuance of the temporary order in this cause.

g. That it is immaterial, whether or not the defendant is compelled to transport the passengers under and by virtue of the
55 provisions of said section six over its line of railway, without receiving any compensation therefor, as in the fifth paragraph of said further answer alleges, and such allegations doen (do) not constitute any defense to the cause of action herein stated.

h. That it is immaterial whether or not the persons riding over the line of the defendant, under the provisions of said section six, do so upon a free ticket, frank, free pass or other gratuity, as under the conditions of said section six contained, it is not a violation of the laws of the State of Colorado, and constitutes no defense to the action stated in the complaint herein, and does not justify a violation of the contract heretofore made between the plaintiff and the defendant.

Respectfully submitted,

(Signed) CRUMP & ALLEN,
ROY H. BLACKMAN,
Attorneys for Plaintiff.

56 Be it remembered, That heretofore and on the 8th day of December, A. D. 1914, the same being one of the days of the October A. D. 1914 Term of said District Court, the following proceedings, inter alia, were had and done to-wit,—

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

No. 848.

THE CITY OF ENGLEWOOD, Plaintiff,

v.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Defendant.

Order Making Temporary Injunction Permanent.

At this day comes the plaintiff by their attorneys, Crump & Allen and R. H. Blackman, Esq., also comes the defendant by its attorney

W. H. Caley, Esq., and thereupon, this cause coming on to be heard upon plaintiff's demurrer to defendant's answer filed herein.

It is argued by respective counsel for and against said demurrer, and the Court being now sufficiently advised in the premises, it is ordered by the Court that the demurrer be and it is hereby sustained, to which ruling of the Court, the defendant, by its attorney, saves an exception.

Thereupon the defendant, by its counsel, elected to stand upon his answer.

Thereupon, the plaintiff, by its counsel, moves the court for judgment upon the pleadings and that the temporary in-
57–66 junction herein be made permanent. Thereupon, it is ordered by the court that the temporary injunction herein be made permanent, to which ruling of the court, the defendant, by its counsel excepts.

Whereupon, the defendant, by its counsel requested the court to consider a motion for a new trial, embodying the same grounds as he had raised against the issuance of the writ herein, and to overrule the same as though it were filed as a part of the record herein, and the Court granted said request, and overruled said motion as though the same had been filed, to which ruling of the court, the defendant saved an exception, and asked time in which to prepare and tender his bill of exceptions.

Thereupon it is ordered by the Court that the defendant herein have time and until thirty days in which to prepare and tender his bill of exceptions.

* * * * * * *

67 And afterwards, and on to-wit: the 3rd day of July, A. D. 1916, the same being one of the regular juridical days of the April, 1916, Term of said Supreme Court, the following proceedings, inter alia, were had and entered of record, to-wit:

The Supreme Court of the State of Colorado reconvened on the 3rd day of July, A. D. 1916, at 10 o'clock A. M. pursuant to recess.

Present:

Honorable William H. Gabbert, Chief Justice;
Honorable S. Harrison White,
Honorable William A. Hill,
Honorable James E. Garrigues,
Honorable Tully Scott,
Honorable James H. Teller,
Honorable Morton S. Bailey,
Associate Justices;
Honorable Fred Farrar, Attorney General;
Mr. James R. Killian, Clerk;
Mr. William T. Heiskell, Bailiff.

Whereupon, the following proceedings were had and done:

68 No. 8542.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Plaintiff in Error,

vs.

CITY OF ENGLEWOOD, Defendant in Error.

Error to the District Court of Arapahoe County.

This cause having been brought to this Court by writ of error to review the judgment of the District Court of Arapahoe County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of the said District Court be, and the same is hereby, reversed, annulled, and altogether held for naught; and that this cause be remanded to said District Court which is directed to enter judgment dismissing the proceeding.

It is further ordered and adjudged that the said plaintiff in error do have and recover of and from said defendant in error its costs in this behalf expended, to be taxed.

And let the opinion of the court filed herein be published, which said opinion is in words and figures following, to-wit:

69 No. 8542.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Plaintiff in Error,

vs.

CITY OF ENGLEWOOD, Defendant in Error.

Error to the District Court of Arapahoe County, Colorado.

Hon. H. S. Class, Judge.

Judgment Reversed.

Mr. W. H. Caley, and Mr. F. W. Varney, Attorneys for Plaintiff in Error.

Mr. R. H. Blackman, and Messrs. Crump & Allen, Attorneys for Defendant in Error.

Mr. Fred Farrar, Att'y Gen'l; Mr. Frank C. West, Asst. Att'y Gen'l; Mr. M. H. Aylesworth, Attorneys for the Public Utilities Commission.

Filed in the Supreme Court of the State of Colorado Jul 3, 1916. James R. Killian, Clerk.

70 Mr. JUSTICE SCOTT delivered the opinion of the court.

This is an action in injunction and the issue was determined on the pleadings. There is no dispute as to the facts.

The complaint alleges that the City of Englewood, defendant in error, on the 6th day of December, 1906, and while it was an incorporated town, by ordinance granted to the grantors of The Denver and South Platte Railway Company, defendant in error, a franchise for the operation of a street railway upon and across certain of its streets. That section six of said ordinance fixed the rates of fares to be charged within said city, and further, provided by reasonable regulation for the sale of coupon tickets which shall entitle passengers taking passage on the cars of said grantees, their successors or assigns, going north on said Broadway at or north of Quincy Avenue, to be transported the same as regular Tramway passengers, without extra fare upon the cars of the Denver City Tramway Company at Hampden Avenue, and, also entitling passengers going south on the cars of the Denver Tramway Company, to be transported upon the cars of said grantees to the intersection of any streets between Hampden and Quincy Avenues, the latter inclusive avenue without additional fare, upon presentation of said coupon ticket.

It was further alleged: "That at the time of the passage of said ordinance, and the granting of said franchise to the grantors of the said defendant, the Denver City Tramway Company was engaged in operating a street railway as a common carrier between the City of Denver and the said Hampden Avenue, at the intersection of said Hampden Avenue and Broadway, in the said City of Englewood, and that thereafter the defendant company did until

71 on or about the 28th day of October, A. D. 1914, substantially comply with the terms and conditions of said section six of said ordinance, and for some years thereafter did in fact provide for those seeking passage upon the cars of the said The Denver City Tramway Company, without extra charge as provided in section six of said ordinance."

It is then alleged that since the said 28th day of October, 1914, the defendant has refused to comply with that provision of the ordinance in the matter of providing the sale of coupon tickets entitling possengers to transportation to and from the city of Denver on the line of the Denver Tramway Company, as provided by the terms of the ordinance.

The prayer was for injunction to compel the enforcement of the terms of the ordinance in the particular respect.

The answer of the defendant company, admits the ordinance and the terms thereof, and alleges that from the date of the passage of the ordinance up to October 28th, 1914, the defendant had given and tendered to all persons seeking passage on its cars between the points complained of, free service and transfers entitling passengers to passage between such points.

The answer further alleges that the defendant has sought to make arrangements with the Denver Tramway Company for the transfer

of passengers taking passage upon its lines, between the points set out in the complaint, and that the only provision it has been able to make is that the Denver Tramway Company shall receive five cents from all passengers so transferred and transported.

It is then alleged that the defendant is a public utility
72 and subject to the provisions of the Public Utility Law, and further, that:

"Pursuant to the provision of law in such case made and provided it did file with the Public Utilities Commission of the State of Colorado, its schedule of rates and that its schedule of rates so filed were not suspended by the said Public Utilities Commission herein upon its own motion, or upon the complaint of others for a period of thirty days; and that thirty days expired from the time of the filing the same and from the 28th day of September, A. D. 1914, and until the 28th day of October, A. D. 1914, and thereupon and pursuant to law, the said rates did on the 28th day of October, A. D. 1914, go in effect and become and now are the established effective rates, fares and charges, practices, rules and regulations of this defendant company."

It is then said in substance, that to comply with the ordinance in the matter complained of, it must violate the Public Utility Law as relates to the prohibition of free service or free transportation.

Further, that the plaintiff and all others who may claim to be injured by reason of the premises, have a plain, speedy and adequate remedy at law under the Public Utilities Law of the State.

To this answer the plaintiff filed a demurrer upon the ground that the same does not constitute a sufficient defense to the complaint. The court sustained the demurrer, and the defendant electing to stand upon its answer, judgment was rendered in accordance with the prayer of the complaint. This judgment is before us for review.

It will be seen that the defendant company contends that its present rates of service are those fixed by the State Public Service Commission in due compliance with the statute creating such commission and prescribing its powers and duties, and the first
73 question therefore presented in this particular, is, may the commission alter a rate or regulation, fixed by a franchise ordinance prior to the enactment of the Public Utilities law.

It must be conceded that the ordinance and the acceptance thereof, constituted a contract, which the city and the company, were at the time, empowered to make. If the contract is now an enforceable one, the present action in equity was proper.

The city of Englewood was at the date of the ordinance a town operating under the general law of the state, as appears from the pleadings. Its sole power to enact such an ordinance was in section 6676 Rev. Stat. 1908, as follows:

"No franchise or license giving or granting to any person or persons, corporation or corporations, the right or privilege to erect, construct, operate or maintain a street railway, electric light plant or system, telegraph or telephone system within any city or town, or to use the streets or alleys of a town or city for such purposes, shall be granted or given by any city of the first or second class

or by any incorporated town in this state in any other manner or form than by ordinance passed and published in the manner hereinafter set forth."

It will thus appear that the legislature had conferred no specific power upon the town of Englewood to enact a rate making ordinance. The only specific power conferred upon the municipality by this section, is to grant a franchise in the form of an ordinance. There does not appear a suggestion as to a rate making power, and no such power can be inferred. It may be conceded that as between the parties, such ordinance constituted a valid contract.

The question to be determined is as to the effect upon such a contract by the enactment of the public utility law, Chap. 127 Laws 1913. This act is very broad and seems to confer the absolute
74 power to regulate, both as to rates and otherwise, all public utilities within the state, at least all such as are specified in the act, and among which are street railways.

Section 13 of the act provides:

"Section 13. All charges made, demanded or received by any public utility, or by any two or more public utilities, for any rate, fare, produce or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such rate, fare, product or commodity or service, is hereby prohibited and declared unlawful."

By Section 14, the Public Utilities Commission was given the power, and it was made its duty, to adopt all necessary rates and regulations of all public utilities, as follows:

"Section 14. The power and authority is hereby vested in The Public Utilities Commission of the state of Colorado, and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges and tariffs of every public utility of this state as herein defined, the power to correct abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this state, and to generally supervise and regulate every public utility in this state and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in this act, through proper courts having jurisdiction."

Section 21 fixed the maximum rate to be charged passengers by a street railway and provides for transfers as follows:

"Section 21. No street or interurban railroad corporation shall charge, demand or collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, city or town; except upon a showing before the commission that such greater charge is justified. Every street or interurban railroad corporation shall upon such terms as the commission shall find to be just and reasonable furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within

the same city and county, or city or town, not reached by the originating car."

75 Further powers were conferred upon the commission by Sec. 23 as follows:

"Section 23. (*a*) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, tolls, fares, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service, or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory, or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges, or classifications, are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

(*b*) The commission shall have the power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule, or schedules, in lieu thereof."

From the sections quoted, and from other provisions of the act, it fully appears that the legislature intended to delegate to the Public Utilities Commission the administration, supervision and regulation of all service rendered to the public throughout the state, including municipalities. Rates and regulations fixed by contract are specifically included within the powers of the commission.

From what has been said it will be seen that the town of Englewood had no express authority to fix a rate of fare, so as to limit or prohibit the assumption of such power by the legislature.

76 The uniform rule in this respect was stated in Home Telegraph Co. v. Los Angeles, 211 U. S., 265, to be:

"It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S. 368, 382; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing pro tanto and undoubted power of government, both its existence and the authority to make it, must clearly and unmistakably appear, and all doubts must be resolved in favor of

the continuance of the power. Providence Bank v. Billings, 4 Pet. 514, 561; Railroad Commission Cases, 116 U. S. 307, 325; Vicksburg &c., Railroad Co. v. Dennis, 116 U. S. 665; Freeport Water Co. v. Freeport City, 180 U. S. 587, 599, 611; Stanislaus County v. San Joaquin C. & I. Co. 192 U. S. 201, 211; Metropolitan Street Ry. Co. v. New York, 199 U. S. 1. And see Water, Light and Gas Co. v. Hutchinson, 207 U. S. 385."

In Freeport Water Co. v. Freeport, supra, it is said:

"This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955, 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' "

In the well considered case of Benwood v. Public Service Commission (W. Va.) 83 S. E. 295, and reported in L. R. A. 1915C 261, it was said:

"But the city of Benwood says it had the right given it by the legislative charter to 'contract and be contracted with.' True this general provision usually found in municipal charters is in the charter of the city of Benwood. But that provision cannot be construed as delegating beyond legislative control, the power to
77 fix public service rates. For, as we have seen, the presumption is against such delegation of the power. The delegation 'must clearly and unmistakably appear.' It does not so appear in the general provision, merely to contract and be contracted with."

And further: "We do not say that the contract as to rates contained in the franchise was not good as between the water company and the city as long as the legislature did not exercise its superior and supreme power over the subject of the rates. From the general powers to establish waterworks and to contract and be contracted with, impliedly the city had the power to contract in the matter of rates for water furnished the public as long as the legislature did not exercise its reserved power in that particular. But that implied power was inferior to the reserved power. It was subject to the right of the legislature to prescribe different rates at any time. The legislature, not having expressly delegated to the city power by which it could inviolably agree as to the rates, could exercise power in that particular regardless of the franchise provisions. It had withheld supreme power unto itself. Neither by the charter nor by subsequent legislation did it delegate to the city of Benwood authority to agree unalterably as to the rates for a stipulated period.

The water company and the city in the making of the so-called franchise contract were bound by cognizance of the fact that their dealings were subject to future exercise of the legislature's power over rates for water furnished the general public in the locality. Hence, the franchise was made subject to what the legislature might thereafter do as to the rates dealt with by the franchise. It was subject to the legislature's making use of the inherent power re-

served, and not exclusively delegated to the city of Benwood, to supervise all public service charges. And when the legislature in its wisdom saw fit to exercise its reserved power of supervision over the matter of public service rates, by the creation of the Public Service Commission and the delegation of the power to the Commission in that behalf, the rates mentioned in the franchise became subject to supervision and regulation by the Public Service Commission. The legislature had withheld the exercise of its power over those rates until that time. It could use the power when it pleased. No length of nonuser affected the state's right thereto. Chicago B. & Q. R. Co. v. Iowa (Chicago B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94."

It was further held in that case: "It is most earnestly insisted on behalf of the city that the contract is inviolable, and that to
78 uphold the powers of the Public Service Commission to the extent of allowing the Commission to change the rates would in effect abrogate the contract, contrary to constitutional inhibitions against the enactment of any law impairing the obligation of a contract. In the light of what we have said, this position cannot be sustained. Nothing that was binding in the contract will be impaired. By it the state was not bound. The contract related to a subject-matter belonging to the state. The state had not given the city the power or agency to contract away its right thereto for a given time. The contract, having been entered into without express legislative authority, was permissive only. It was conditioned upon the exercise of the sovereign power over the subject-matter. All this the parties to the contract were bound to know when they entered into it. There can be no impairment of the contract by the act of the state in claiming its own, when it is not bound by the contract. The supervision and regulation of the rates by the state, through the Public Service Commission, do not take from either of the parties to the contract any right which they had thereunder. Such supervision and regulation do not therefore impair the obligation of a contract. Home Telep. & Teleg. Co. v. Los Angeles, supra; State ex rel. Webster v. Superior Court, 67 Wash. 37, Post, 287, 120 Pac. 861, Ann. Cas. 1913D 78; Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; Louisville & N. R. Co. v. Mattley, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep 265; Wyandotte County Gas Co. v. Kansas, 231 *Y*. S. 622, 58 L. ed. 404, 34 Sup. Ct. Rep. 226; Dawson v. Dawson Teleph. Co. 137 Ga. 62, 72 S. E. 508."

The doctrine announced in that case is a fair statement of the overwhelming weight of judicial opinion.

The case of State ex rel. Webster v. Superior Court, 63 Wash. 37, and also reported in L. R. A. 1915C, p. 287, contains an exhaustive review of the authorities on this subject. See also Milwaukee Electric Ry. Light & Power Co. v. Railroad Comm. 238 U. S. 174. This doctrine has been recognized by this court in the case of Wolverton v. Mountain States Tel. Co., 58 Colo. 58, wherein it was said:
79 "And it is now held that even in case of such contracts with public utilities for specific rates and for definite periods of

time, these are subject to legislative acts of regulation. Louisville & Nashville Ry. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L. R. A. (N. S.) 671; Southern Wire Co. v. St. Louis &c. Co., 38 Mo. App. 111."

We must hold therefore, that at the time of the adoption of the ordinance in question, the town of Englewood, was without express legislative power to fix rates or regulations for public utilities and that its contract with the defendant company, was subject to the legislative power afterward asserted, by the enactment of the Public Utilities Statute.

It follows therefore, that the power to regulate the rates of the public utility in question, is vested by the act exclusively in the Public Utilities Commission. The law fully provides that every order or decision made by the commission, may be reviewed by the Supreme Court upon the application of either party, or of any person pecuniar-ly interested in the utility, for the purpose of having the lawfulness of the order or revision determined.

Hence, and for the reasons stated, the plaintiff below had by reason of the provisions of the Public Utility Act, a plain, speedy and adequate remedy at law for the determination of its grievance.

It will be noted that the town, now City of Englewood is a municipality deriving its municipal powers from legislative grant. Whether or not the rule here announced may be applied in the case of an ordinance by a municipality operating under Art. 20 of the Constitution, and conducting its municipal affairs under con-
80 stitutional powers and limitations, without the intervention of legislative acts, is a different and more difficult question, which we do not determine.

The judgment is reversed with instruction to dismiss the proceeding.

En banc.

Gabbert, C. J., and Teller, J., dissent.

81 Filed in the Supreme Court of the State of Colorado, Jul-3, 1916. James R. Killian, Clerk.

8542.

Chief Justice GABBERT, dissenting:

The majority opinion is based upon three propositions: First. That by the Public Utilities Act power is conferred upon the Public Utilities Commission to change the rates for carrying passengers fixed by contract; Second. That the Railway Company having filed with the Commission its schedule of rates, which were not suspended by the Commission upon its own motion or upon the complaint of others for thirty days, the same became effective; and, Third. That by the act in question the City has a plain, speedy and adequate remedy at law by a proceeding before the Commission. From each of these I dissent.

1. It is said specific power is not conferred upon the City of Engle-

wood to enact a rate-making ordinance, and therefore rates fixed by the ordinance granting the Railway Company a license to construct and maintain a street railway upon its streets may be changed by the Utilities Commission. In the first place the question of rates for transportation over the line of the Railway Company is not involved, and in the second place express power is conferred upon the City to fix rates which may be charged by a street railway company to which a franchise is granted. The provisions of the ordinance which the Railway Company seeks to be relieved from does not relate to rates which it may charge for transportation over its own line,
82 but to the provision whereby it was required to sell coupon tickets which would entitle persons taking a car going north from a specified point to passage on the line of the Denver City Tramway Company into the City of Denver, and also entitle persons going south on the cars of the Tramway Company to be transported over the line of the Railway Company to a street designated in the City of Englewood. This is in no sense a charge for transportation over the line of the Railway Company. The fare over its line has always been five cents, and its effort is not to increase or change rates, but to be relieved from its contract, whereby it was required to furnish transportation over the line of the Tramway Company in the instances named. But conceding, for the sake of the argument, that rates are involved, the cases cited in support of the proposition that authority is not conferred upon the City of Englewood to fix rates are not in point. Our statutes and our constitution confer upon the City the power to fix rates as a condition upon which a franchise to operate a street railway over its streets is granted. Section 6676, Revised Statutes 1908, quoted in the majority opinion, must be read in connection with the section following, whereby it is provided that a corporation desiring to secure a franchise from a city or incorporated town must publish a notice of its intention to apply to the corporate authorities for the passage of an ordinance granting such franchise, which notice must specify the terms upon which such franchise is desired. This means that the franchise can only be granted upon terms, and necessarily confers upon the mu-
83 nicipal authorities the express power to contract with the corporation seeking the franchise by specifying the terms upon which it is granted. So that when a corporation accepts a franchise imposing terms it thereby enters into a contract the municipal authorities are authorized to make, which cannot be abrogated by any act of the legislature that would impair the obligation of such contract. In addition, we have a constitutional provision, Section 11 of Article XV, which provides: "No street railroad shall be constructed within any city, town or incorporated village without the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." From this provision it follows that when a street railway cannot be constructed over the streets of a city without the consent of the municipal authorities, the latter have the express power to specify the terms and conditions upon which it may be constructed and maintained.

2. Conceding that power is vested in the Utilities Commission to

change a rate fixed by contract, this cannot be accomplished in the manner attempted by the Railway Company, i. e., by posting notice of such change with the Commission. A change in a contract rate can only be made by a utility corporation making application to the Commission for such change, on notice to the parties interested, after a hearing whereby all parties are afforded an opportunity to be heard and a change allowed by an express order of the Commission to that effect.

3. The act does not require the City to apply to the Commission to have its contract with the Railway Company enforced.

84–86 It has never been modified. It is in full force and effect, and the only remedy open to the City is by an action in the District Court to compel the Railway Company to comply with the terms of its contract.

The result of the conclusion announced by the majority opinion is sufficient to demonstrate without further argument that it is wrong. The Railway Company was granted the privilege of occupying the street of the City upon terms with which it now refuses to comply and yet continues to occupy the street. One of the considerations which moved the municipal authorities to grant a franchise to the Railway Company has been taken away and it is permitted to exercise a privilege which it must be conclusively presumed would never have been granted except for such consideration.

The judgment of the District Court should be affirmed.

Mr. Justice Teller concurs in this opinion.

* * * * * * *

87 And further and on to-wit: December 4, 1916, the following proceedings were had and entered of record:

No. 8542.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY, Plaintiff in Error,

vs.

THE CITY OF ENGLEWOOD, Defendant in Error.

Error to the District Court of Arapahoe County.

The Court having considered the arguments of counsel upon the petition for a rehearing in this matter, and being now well advised in the premises, doth order that said petition be, and the same is, hereby denied.

88 And afterwards, and on to-wit: the 23rd day of December, A. D. 1916, the following original assignments were filed in our said Supreme Court, together with the following original petition for a writ of error to the Supreme Court of the United States, and the allowance of said writ was duly endorsed thereon.

89 *Petition for Writ of Error.*

In the Supreme Court of the State of Colorado.

No. 8542.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY, Paintiff in Error (Defendant Below),

v.

THE CITY OF ENGLEWOOD, Defendant in Error (Plaintiff Below).

Considering itself aggrieved by the final decision of the Supreme Court of the State aforesaid, in rendering judgment against it in the above entitled cause, the above named defendant in error, The City of Englewood, who was the plaintiff in the District Court, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, the same to operate as a supersedeas. Assignment of errors herewith.

L. F. TWITCHELL,
CRUMP & ALLEN,
ROY H. BLACKMAN,
Attorneys for Defendant in Error.

90 STATE OF COLORADO,
In the Supreme Court, ss:

Let the writ of error issue upon the execution of a bond for costs by the City of Englewood to The Denver & South Platte Railway Company, in the sum of Two Hundred & fifty ($250.00) Dollars, and the said writ is hereby made to operate as a supersedeas without the execution of any supersedeas bond, on the part of the said The City of Englewood.

Dated this 23rd day of December, A. D. 1916.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of Colorado.

91 Supreme Court of the State of Colorado.

No. 8542.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY, Plaintiff in Error (Defendant Below),

v.

THE CITY OF ENGLEWOOD, Defendant in Error (Plaintiff Below).

Assignment and Prayer.

Comes now the above named defendant in error, plaintiff below, and files herewith its petition for writ of error, and says that there

are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of the State of Colorado erred in the following particulars, to-wit,

First. The opinion of the Court is erroneous because it assumes, directly contrary to the facts and to the terms of the contract between the City of Englewood and the Railway Company, that
92 the question of fixing rates for the carrying of passengers is involved.

Second. The opinion of the Court is erroneous in that it is in direct violation of Article 1, Section 10 of the Constitution of the United States, which declares,

"No state shall * * * pass * * * any law impairing the obligation of contracts. * * *"

Third. The opinion of the Court is erroneous in that it holds that the Public Utilities Act vests in the Public Utilities Commission the power and authority to violate a solemn contract made and entered into between the municipality and the railroad company, fixing the conditions and rates for the transportation of passengers over and along the public thoroughfare of the city.

Fourth. The opinion of the Court is erroneous and in violation of the fundamental rules of law in that it vests in the board created by the legislature, full, complete and exclusive power and authority to overturn, abrogate and annul a solemn, binding contract made and entered into between the plaintiff and defendant, upon a good, lawful and valid consideration.

Fifth. The opinion of the Court is erroneous in that it vests in the Public Utilities Commission judicial power, and takes away
93 from the constitutional courts of the state and of the United States, their inherent, fundamental and necessary powers and jurisdiction.

Sixth. The opinion of the Court is erroneous because it seeks to grant to the Public Utilities Commission exclusive and original judicial jurisdiction hitherto and now exclusively possessed by the constitutional courts of the state and of the United States.

Seventh. The said opinion is erroneous in holding, contrary to the law and to the facts in the case, that the City of Englewood and its inhabitants have a spedy and adequate remedy at law before the said so-called Public Utilities Commission, whereas, the only efficient remedy which the said city has to enforce the solemn contract and obligation of the railway company is by a suit in the proper court for the enforcement of such contract.

Eighth. The said opinion is erroneous in that it denies to the courts of the state, and of the United States, their consitutional, inherent and fundamental powers and duties, and attempts to place such duties in the hands of the so called Utilities Commission, contrary to the constitution of the State of Colorado, and of the United States, and if permitted to stand, will result in endless con-
94 fusion, inefficiency and inability to construe, declare and enforce solemn and binding contracts made between municipali-

ties and public utility corporations, upon valid consideration, prior to the passage of the so-called Utilities Act.

Ninth. The Court erred in holding that Section 127 of the Laws of 1913 of the State of Colorado, called the Public Utilities Law, vests in the so-called Public Utilities Commission power to abrogate, set aside and annul the solemn provisions of the ordinance under which the defendant, The Denver & South Platte Railway Company, secured its license or franchise to occupy and operate its line of railway upon the public streets of the plaintiff city, and in so holding, the obligations of a valid, binding contract duly and legally made and entered into between the parties to this controversy, have been abridged, impaired, destroyed and set aside in direct contravention of Article 1 of Section 10 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts, and because the validity of said Act of the legislature, as applied to the facts in this case, was denied and drawn in question by the plaintiff, on the ground that the said act is repugnant to the constitution of the United States, and in contravention thereof.

95 Tenth. That the decision of the Supreme Court of the State of Colorado, is an unwarranted and unconstitutional attempt to apply the law fixing the powers of the Utilities Commission under the act of the legislature of the State of Colorado referred to, to the facts in this case, and that by such construction and application, the obligations of the contract between the parties hereto, have been impaired and destroyed.

For which errors, the plaintiff (defendant in error) the City of Englewood, prays that the said judgment of the Supreme Court of the State of Colorado, dated on the 3rd day of July, A. D. 1916, wherein it is adjudged and decreed that this action be dismissed and be reversed, and that the final judgment, order and decree of the said Supreme Court denying your petitioner's application for a rehearing be also reversed and set aside, and that judgment by the Supreme Court of the United States be rendered in favor of the said City of Englewood, and against the defendant, and for costs.

L. F. TWITCHELL,
CRUMP & ALLEN,
ROY H. BLACKMAN,
Attorneys for the City of Englewood.

95½ [Endorsed:] In the Supreme Court of the State of Colorado. No. 8542. The Denver & South Platte Railway Company, Plaintiff in Error, v. The City of Englewood, Defendant in Error. Petition for Writ of Error Assignments and Prayer.

96 *Writ of Error.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between The Denver & South Platte Railway Company and The City of Englewood, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set
97 up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said The City of Englewood, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 26th day of December, in the year of Our Lord, one thousand nine hundred and sixteen, and of the Independence of the United States, the 141st year.

98 Issued at office in the City and County of Denver, in said district, with the seal of the District Court of the United States for the District of Colorado, and dated as aforesaid.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk District Court United States,
District of Colorado.

WILLIAM H. GABBERT,
Chief Justice Supreme Court of Colorado.

98½ 100 [Endorsed:] United States of America, District of Colorado. The Denver & South Platte Railway Company, Plaintiff in Error, v. The City of Englewood, Defendant in Error. Writ of Error.

101 And further and on to-wit: the 26th day of December, 1916, there was filed in our said Court an original citation with service acknowledged, as follows, to-wit:

102 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Denver & South Platte Railway Company, Greeting:

You are hereby cited and admonished to appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Colorado, wherein the Denver & South Platte Railway Company is the plaintiff in error, and was the defendant in the District Court, and in which the City of Englewood is the defendant in error, and was the plaintiff in the said District Court, then and there to show cause, if any there be, why the judgment rendered against the said City of Englewood, defendant in error, herein, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Colorado, this 23rd day of December, A. D. 1916.

WILLIAM H. GABBERT,
Chief Justice Supreme Court of the State of Colorado.

Attest:
JAMES R. KILLIAN,
Clerk Supreme Court of the State of Colorado.

103 STATE OF COLORADO,
County of Arapahoe, ss:

—— ——, of lawful age, being first duly sworn, on oath deposes and says: I was duly authorized and deputized by Hon. Wm. H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado, to serve upon the plaintiff in error, the citation hereto attached. I served the same by delivering, personally, to W. H. Caley, attorney for the Denver & South Platte Railway Company, plaintiff in error, a true and correct copy of said citation, with all endorsements thereon, at Littleton, in the said County of Arapahoe, State of Colorado, on the — day of December, A. D. 1916, at — o'clock, — M.

Witness my hand this — day of December, A. D. 1916.

—— ——.

Subscribed and sworn to before me this — day of December, A. D. 1916.

____ ____,
Notary Public.

My commission expires —.

Received copy of the within Citation, this 27th day of December, A. D. 1916.

W. H. CALEY,
Attorney for the Denver & South Platte Railway Company.

103½ & 104 [Endorsed:] In the Supreme Court of the State of Colorado. No. 8542. The Denver & South Platte Railway Company, Plaintiff in Error, v. The City of Englewood, Defendant in Error. Citation.

105 IN THE SUPREME COURT, STATE OF COLORADO, *ss:*

I, James R. Killian, Clerk of said Supreme Court, do hereby certify that the foregoing pages, numbered from 1 to 106 inclusive, are a true, full and complete transcript of the proceedings in the case of The Denver and South Platte Railway Company, Plaintiff in Error, vs. The City of Englewood, Defendant in Error, and also the opinion of the Court rendered therein as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Denver, State of Colorado, this 13th day of January, A. D. 1917.

[Seal of the Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court, State of Colorado.

106 UNITED STATES OF AMERICA,
Supreme Court of Colorado:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Colorado, in the City of Denver, this 13th day of January, A. D. 1917.

[Seal of the Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

Costs of transcript, $40.05, paid by Plaintiff in Error, The City of Englewood.

107 In the Supreme Court of the United States.

THE CITY OF ENGLEWOOD, Plaintiff in Error,

v.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY, Defendant in Error.

Stipulation.

It is stipulated and agreed by and between counsel for Plaintiff in Error, and counsel for Defendant in Error that in order to save expense in the printing of the record herein, the following portions of the record—the same being sufficient to show the errors complained of—shall be printed and no more—

1. Citation and acceptance of service of the Record, page 102.
2. Writ of error, page 96.
3. Return of the clerk of the Supreme Court on writ of error, page 106.
4. Complaint, page 5.
5. Answer, page 43.
6. Demurrer to Answer, page 53.
7. Judgment and Order of the District Court of Arapahoe County, Colorado, page 33.
8. Order of Injunction, page 56.
9. Judgment and opinion of the Supreme Court, page 70.

108 10. Dissenting opinion by Chief Justice Gabbert, page 81.

11. Order of Supreme Court denying Petition for Rehearing, page 87.
12. Petition for Writ of Error, page 89.
13. Order granting Writ of Error, page 90.
14. Assignment of Errors and Prayer, page 91.
15. Clerk's certificate of Transcript, page 105.

It is further stipulated and agreed, that if from oversight or omission any necessary portion of the Record be not thus printed, that the plaintiff in error has a right to print, or may be required by the defendant in error to print, any further or additional portion thereof.

Dated this 17th day of January, A. D. 1917.

L. F. TWITCHELL,
CRUMP & ALLEN,
S. D. CRUMP,
H. C. ALLEN,
Counsel for Plaintiff in Error.
FRED FARRAR,
Counsel for Defendant in Error.

109 [Endorsed:] 889/25719. In the Supreme Court of the United States. The City of Englewood, Plaintiff in Error, v. The Denver & South Platte Railway Company, Defendant in Error. Stipulation.

110 [Endorsed:] File No. 25,719. Supreme Court U. S., October Term, 1916. Term No. 889. The City of Englewood, Pl'ff in Error, vs. The Denver & South Platte Railway Company. Stipulation as to printing record. Filed January 27, 1917.

Endorsed on cover: File No. 25,719. Colorado Supreme Court. Term No. 889. The City of Englewood, plaintiff in error, vs. The Denver & South Platte Railway Company. Filed January 23d, 1917. File No. 25,719.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 889.

THE CITY OF ENGLEWOOD, PLAINTIFF IN ERROR,

vs.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

MOTION TO VACATE SUPERSEDEAS.

Comes now the defendant in error by Fred Farrar, its counsel, and moves that the supersedeas heretofore, on the twenty-third day of December, A. D. 1916, allowed the said plaintiff in error by the Chief Justice of the Supreme Court of the State of Colorado, be vacated for the reason that no supersedeas bond was required nor given, but, on the contrary, that a supersedeas was expressly allowed and granted without the giving of any bond save and except a bond for costs.

And for more definite statement of the grounds for motion, it is respectfully shown that the record

discloses that this action is one in which the city of Englewood seeks to compel the performance on the part of the defendant in error of the terms and conditions of a certain ordinance under which the city of Englewood in the year 1906 granted the said defendant in error a franchise for a street railway, operated in part within the corporate limits of said the city of Englewood, upon certain conditions as to the sale of tickets or the issuance of transfers which would accord to the patrons of said street railway, within certain defined limits, the right to transfer and ride upon the cars of a connecting street railway without additional fare.

That thereafter, and in the year 1913, the legislature of the State of Colorado created a Public Utilities Commission, and conferred upon said commission like powers and duties to those usually conferred upon similar commissions in the various states, with full jurisdiction to determine the rates to be charged by public utilities, including street railway lines, and providing also the manner in which rates for service should be established in the first instance and the methods and procedure for a modification thereof.

That pursuant to the provisions of said public utilities act the defendant in error filed its schedule of rates and fares with said commission, which schedule became in due course the regular established rates and fares unless the ordinance of the city of Englewood controlled, and thereafter the defendant in error declined issuing tickets or transfers good upon the connecting street railway mentioned, inasmuch as the said connecting line refused to reciprocate

by a division of the fares received from transferred passengers.

Whereupon, the city of Englewood, suing in behalf of its citizens, commenced this action in the District Court of the State of Colorado, and an order in the nature of a mandatory injunction issued December 8, 1914, against said defendant in error requiring and compelling defendant in error to abide by and fulfill the terms of its franchise regardless of the rates established by the Public Utilities Commission of the State of Colorado. The defendant in error took the cause to the Supreme Court of the State of Colorado on error, where, on the third day of July, A. D. 1916, the judgment of the trial court was reversed and the proceedings ordered to be dismissed, the Chief Justice and one other judge dissenting.

Thereafter, the city of Englewood filed its petition for rehearing, which was, on the fourth day of December, A. D. 1916, denied, and on the twenty-third day of December, A. D. 1916, upon application of the plaintiff in error herein, a writ of error was allowed by the Chief Justice of the Supreme Court of the State of Colorado, the order therefor, page 28 of the printed transcript in this court, being as follows:

> "Let the Writ of Error issue upon the execution of a bond for costs by The City of Englewood to The Denver and South Platte Railway Company, in the sum of Two Hundred Fifty ($250.00) Dollars, and the said Writ is hereby made to operate as a supersedeas without the execution of any supersedeas bond on the part of the said The City of Englewood.

Dated this Twenty-third day of December, A. D. 1916.

WILLIAM GABBERT,
Chief Justice of the Supreme Court, Colorado."

Defendant in error would respectfully show to the court that, because of said supersedeas, it is required to carry passengers within the limited district mentioned in the ordinance without the receipt of any fare whatsoever, and that the number of said passengers so carried without the receipt of any fare whatsoever during the calendar years 1915 and 1916, or practically since the date of the mandatory injunction, aggregates 202,522, as shown by an affidavit filed herewith, and for which said defendant in error would be, under the decision of the Supreme Court of the State of Colorado, in the absence of supersedeas, entitled to charge a fare of five cents per adult passenger and two and one-half cents for children between the ages of six and twelve years.

By reason of the foregoing, defendant in error respectfully moves that the supersedeas issued in this cause be vacated.

FRED FARRAR,
Solicitor for Defendant in Error.

List of Decisions Cited.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 889.

THE CITY OF ENGLEWOOD, PLAINTIFF IN ERROR,

vs.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF IN SUPPORT OF MOTION TO VACATE SUPERSEDEAS.

The defendant in error moves to vacate the supersedeas granted by the Chief Justice of the Supreme Court of the State of Colorado, for the reason that no supersedeas bond was required, but on the contrary that the order allowing the supersedeas grants the writ expressly without giving any supersedeas bond, although a bond in the sum of $250.00 for costs was required and given.

The record discloses that this action is one in which the City of Englewood seeks an order in the nature of a mandatory injunction requiring the Denver and South Platte Railway Company, defendant in error, to carry passengers upon its street railway within certain territorial limits under conditions as to fare and transfer permitting these passengers to ride upon a connecting street railway line without additional fare. This condition was contained in an ordinance adopted by the City of Englewood in the year 1906, through which the defendant in error secured its franchise.

In the year 1913, the State of Colorado enacted a statute creating a public service commission known as The Public Utilities Commission of the State of Colorado, and conferred upon this commission complete and exclusive jurisdiction of the regulation of rates, fares, service, etc., of public utilities. Street railway lines are public utilities within the meaning of the act; moreover, the act expressly prohibited the granting of free service or passes except in certain cases, the case at bar not coming within the exception.

Pursuant to the provisions of the Public Utilities Act of the State of Colorado, the defendant in error filed its schedule of rates and fares with the Commission and in the course of time its schedule became regularly established as to rates and fares, unless the ordinance granting the franchise to defendant in error controlled. In this schedule of the fares established by the Public Utilities Commission, the defendant in error is entitled to charge for all passengers, regardless of the ordinance of the City of Englewood, a fare of five cents for each adult passenger and two and a half cents for each child between the ages of six and twelve years.

After the effective date under the Public Utilities Commission Act for the operation of the schedule of rates and fares filed by the defendant in error, it refused to transport passengers without fare as required by the ordinance of the City of Englewood, the connecting street railway company in the meantime having refused to reciprocate with the defendant in error, with the result that if the defendant in error gave or received transfers or the equivalent of transfers to passengers transferring to or from the other street railway, the defendant in error was actually and in effect carrying these passengers for nothing.

The case was determined by the trial court entirely upon the pleadings, and an order was issued requiring the defendant in error to comply with the terms of the ordinance of the City of Englewood. Writ of error issued from the Supreme Court of the State of Colorado, and on the 3rd day of July, 1916, the Supreme Court of the State of Colorado reversed the judgment of the lower court and directed that the proceedings be dismissed, the chief justice and one other judge dissenting. Later a petition for a rehearing was filed, and this was, on the 4th day of December, 1916, denied. On the 23rd day of December, 1916, the plaintiff in error herein filed its application for a writ of error from this honorable court to the Supreme Court of the State of Colorado. The writ was allowed by the chief justice of the Supreme Court of the State of Colorado on the 23rd day of December, 1916, the order being as follows:

> "Let the writ of error issue upon the execution of a bond for costs by the City of Englewood to The Denver & South Platte

Railway Company, in the sum of two hundred and fifty ($250.00) dollars, and the said writ is hereby made to operate as a supersedeas without the execution of any supersedeas bond, on the part of the said The City of Englewood."

The City of Englewood sued on behalf of its citizens entitled to the alleged privilege granted by the ordinance. It is the sole party plaintiff. The judgment of the trial court requires the defendant in error to conform to and abide by the terms of the ordinance, in effect to transport passengers without receipt of any fare whatsoever, between certain mentioned points. This decision was reversed, but the effect of the order of the chief justice of the Supreme Court of the State of Colorado, granting the supersedeas, stays the judgment of the Supreme Court and puts in operation the order of the trial court. The performance of this order on the part of the defendant in error is no small matter, inasmuch as the defendant in error was required, pursuant to the order of the trial court, to carry during the calendar year of 1915, 104,915 passengers, and during the calendar year of 1916, 97,607 passengers without receipt of any fare whatsoever therefrom, this being shown by an affidavit filed in connection with the motion to vacate the supersedeas. And for these passengers it would, under the decision of the Supreme Court of the State of Colorado, in the absence of the supersedeas, be entitled to charge the sum of five cents for adult passengers and two and a half cents for each child between the ages of six and twelve years. It is obvious that the matter is of importance to the defend-

ant in error. The supersedeas requires it to perform services as a public utility, worth several thousand dollars per year, and which may naturally be expected to continue to be worth several thousand dollars a year, without exacting any bond whatsoever on the part of the City of Englewood, a municipal corporation organized under the general laws of the State of Colorado, suing in behalf of its citizens, whereby it will be required to respond in damages, if this honorable court sustains the decision of the Supreme Court of the State of Colorado.

The Federal Judiciary Act has always required a bond where a supersedeas is granted. The time within which the writ of error must be applied for or in which the bond must be given, has been modified by several amendments to the statute. The present statute, section 1000, Revised Statutes of the United States, has been in effect since 1868. It reads as follows:

> "Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Section 1007 reads as follows:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days."

Section 1003 reads as follows:

"Writs of error from the Supreme Court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

There are numerous decisions construing these acts, or the acts which they amend, and through all of these decisions the doctrine seems to be clearly established that an appeal or writ of error must be

taken in strict compliance with the terms of the statute both as to time and as to the security for costs and security for damages in the event of a supersedeas. We have found no decision holding or intimating that the supersedeas bond may be waived in the discretion of the court or the judge granting the writ. On the other hand, every decision seems to recognize the principle that a supersedeas bond is in all cases essential where supersedeas is granted.

In some cases the question has been presented to this court by a motion to dismiss the appeal, but the better practice, as we understand it, if a bond for costs has been given, is by motion to vacate the supersedeas.

In Catlett vs. Brodie, 9 Wheat., 553, a motion was made in this court to dismiss the suit unless the plaintiff in error should give new bonds for the prosecution of the writ within a limited period to be fixed by the court, upon the ground that the writ of error had been allowed by the trial judge upon bonds in sums too small to respond to damages and costs. The court, after reviewing the Judiciary Act of 1789 requiring a bond for a supersedas, says:

> "It has been supposed at the argument, that the act meant only to provide for such damages and costs as the court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is

affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; and for such amount only is the obligee entitled to judgment."

It was ordered by the court that the cause stand dismissed unless the plaintiff in error within thirty days from the rising of the court give a bond with good and sufficient security in due form of law to prosecute his writ with effect and to answer all damages and costs if he fail to make his plea good.

Stafford et al. vs. The Union Bank of Louisiana, 16 Howard, 135, was an appeal from the District Court of the United States for the State of Texas. The motion was made to dismiss the appeal upon the ground that security had been given in the sum of $10,000 only, when the sum decreed to be paid was $65,000. It appears that certain property in question was in the hands of a receiver and that he and other persons had given bonds for the safe keeping and delivery of this property in the respective sums of $40,000 and $80,000. It was contended that these bonds should be taken into consideration and that under the circumstances $10,000 was a sufficient bond for a supersedeas. After reviewing the facts in the case and the various decisions, the court says:

"The appeal is for the benefit of the appellant. A decree in the district court has been entered against him, and there is in the custody of the law, a sufficient amount of money and property to pay the amount decreed. An appeal suspends the payment some one or two years, and as this is done for the benefit of the appellants, and at their instance, is it not equitable that the risk should be provided for by them? The law has so decided, by requiring security to be given to the amount of the decree, without reference to the nature of the suit. The provision of the act, as construed by this court, is not a matter over which the court can exercise a discretion. The language is mandatory and must be complied with."

Hudgins vs. Kemp, 18 Howard, 530, was an appeal from the Circuit Court of the United States for the eastern district of Virginia. The motion was made by the appellee to dismiss, not for any irregularity apparent in the record, but by testimony *aliunde* offered to show that the transcript was incorrect. The court says:

"Neither is it of any importance as concerns this motion whether the appeal does or does not operate as a supersedeas. A writ of error or appeal does not operate as a supersedeas under the act of Congress unless security is given sufficient to cover the amount recovered, within ten days after the judgment or decree is rendered. And yet, if the party

does not give the bond within the ten days, he may, nevertheless, sue out his writ of error or take his appeal, as the case may be, at any time within five years from the date of the decree or judgment, upon giving security sufficient to cover the costs that may be awarded against him in the appellate court. And his omission to give the security in ten days is no ground for dismissing the appeal.

In this case certainly, the appeal did not operate as a supersedeas. The security was given and approved long after the time limited by the act of Congress. Nor was any supersedeas moved for or awarded by the circuit court or the judge of the supreme court who approved the bonds. Nor could any have been awarded by any court or judge. And, upon the expiration of the ten days, the plaintiff had a right to proceed on his decree and carry it into execution, notwithstanding the pendency of the appeal in this court. But if a supersedeas had been awarded, this motion could not be sustained. The motion should have been to discharge the order, not to dismiss the appeal. And the propriety or impropriety of an order granting a supersedeas could not be considered on a motion to dismiss. The order for the supersedeas might be discharged and the appeal still maintained. * * * And in order to obtain the supersedeas, the law requires that the security given shall be sufficient to cover the whole amount of the sum recovered against

him, but if he preferred carrying up his case without superseding, the law does not exact security to the amount recovered."

In Patterson vs. De La Ronde, 6 Wall., ..., motion to vacate the supersedeas was allowed for the reason that the bond was not filed within ten days after the writ of error issued. (Note.—I do not find this decision in the official reports. It is reported in the 18th Lawyers' Edition at page 884.)

Kitchen vs. Randolph, 3 Otto, 86. The opinion in this case was written by Chief Justice Waite, and in it the various statutes of Congress relating to supersedeas are reviewed and compared. The only question presented by the motion to vacate the supersedeas was the power of a justice of this court to allow supersedeas where the writ of error was not sued out within sixty days, Sundays exclusive, after the rendition of the judgment. But the case is of interest because of the comprehensive review of the various acts of Congress. Throughout the opinion it is obvious that the principle is established that a bond is essential to a supersedeas under each of the various acts of Congress.

Let us briefly refer to other decisions relating directly or indirectly to this question.

Where the supersedeas bond is clearly defective in not describing the judgment upon which the writ of error was sued out, the supersedeas will be vacated unless the plaintiff in error shall file a new bond in such sum and within such time as directed by the court.

County Court vs. United States ex rel. Harshman, 8 Otto, ...; 25 Law. Ed., 191.

A supersedeas improvidently allowed will be dismissed on motion to vacate.

Title Guaranty & Surety Co. vs. United States, for use of General Electric Co., 222 U. S., 401.

An appeal may be dismissed as to an appellant who has filed no bond.

Beardsley vs. The Arkansas Etc. Ry. Co., 158 U. S., 123.

Where the bond given on the first appeal becomes inoperative by failure to docket the appeal in time, the new appeal, if not accompanied by another bond, will be dismissed unless appellant within the time allowed by this court shall file a proper bond.

Stewart vs. Masterson, 124 U. S., 493.

In the following cases in which no bond had been given, upon motion to dismiss, the court granted the motion in the alternative that a bond be given within a specified time.

Anson, Bangs & Co. vs. Blue Ridge R. R. Co., 23 Howard, 1.

Brown vs. McConnell, 124 U. S., 489.

Peugh vs. Davis, 110 U. S., 227.

May we presume to call attention to Rule 29 of this court? While it does not refer specifically to writs of error to state courts, nevertheless the principle is the same as in cases on error to or appeals from the district courts or the circuit courts of appeals.

We believe that the principle of law is well established by these decisions, that a bond in a sufficient sum to respond to the damages which will be occasioned to the defendant in error in carrying passengers pursuant to the order of the District Court of Colorado, is indispensable to a supersedeas in this case. Apparently this court in its discretion may permit the plaintiff in error to supply a bond at this time as an alternative to an order vacating the writ of supersedeas. If the court in its discretion should see fit to enter such an order, we have supplied sufficient information to enable the court to fix the amount of the bond in such a sum as will respond to the damages occasioned if the judgment of the Supreme Court of the State of Colorado be sustained by this honorable court. We have shown by the affidavit which accompanies our motion to vacate the supersedeas, that during the year 1915, the defendant in error was required to carry 104,915 passengers without fare; at the rate of five cents per passenger, this would have produced a revenue of $5,245.75. It is of course admitted that children between the ages of six and twelve years would have paid a fare of only two and a half cents. In the year 1916 the defendant in error was required to carry free of charge, 97,607 passengers, and these upon the same basis would have produced a revenue of $4,880.35.

Based upon the foregoing statement of facts in this case, and the law as expressed in the decisions cited, the defendant in error most respectfully moves that the order of the chief justice of Colorado granting the supersedeas without bond, be vacated, subject, however, to such conclusion as this court may reach

concerning the right of the plaintiff in error to file a supersedeas bond within such time and in such amount as the court may determine.

Respectfully submitted,

FRED FARRAR,
Solicitor for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 889.

THE CITY OF ENGLEWOOD, PLAINTIFF IN ERROR,

vs.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY,
DEFENDANT IN ERROR,

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO VACATE SUPERSEDEAS.

This suit is one in equity, and the relief sought and attained in the trial court was injunctive purely. It, therefore, does not necessarily fall within the statute governing appeals and errors. The supersedeas is not a statutory right, as we understand it, but is wholly discretionary, and has always been granted in the discretion of the Court, without reference to any statutory authority.

Tornanses v. Melsing, 45 C. C. A. 615;
re Classen, 140 U. S. 200.

The Chief Justice of the Supreme Court of the State of Colorado, in determining that a federal question is involved in this question, and that the writ of error should be made to operate as a supersedeas, in his discretion allowed the writ, upon the filing of a cost bond in the sum of two hundred and fifty ($250.00) dollars, and without the requirement of any supersedeas bond whatever, ordered that the said writ be made a supersedeas.

This, we understand to be, a matter solely within the discretion of the Chief Justice, and in cases where the state or municipalities, or other subdivisions of the state, seek a review by this Court, supersedeas bonds are seldom, if ever, required. This proceeding is analogous to the practice in the state court and is based upon statutes as well as upon practice. A municipality is a part of a state government. Judgments are collected against a city or county by levy, and we take it that in the absence of a showing that a municipality is bankrupt, and unable by the usual method of taxation to respond, that no supersedeas bond ought to be required.

The provision of our own Code is as follows:

> "The state, the county commissioners of the various counties, cities, towns and school districts, and all charitable, educational and reformatory institutions under the patronage or control of the state, and all public officers when suing or defending in their official capacities for the benefit of the public, shall, in all cases of writ of error from the Supreme Court, prosecute the same without giving bond."

The foregoing is a part of an Act in relation to appeals and writs of error, approved May 28, 1911. A similar provision has been in the Colorado Code ever since territorial days. Our advice is that all of the states have similar provisions. There is no federal statute, as we understand it, requiring a supersedeas bond in all cases. None has been cited by counsel in his brief in support of his motion to vacate the supersedeas.

Every case cited by him is only concerning private litigation between individuals.

As before stated, the judgment effected by this proceeding is a judgment in the Supreme Court, vacating an injunction granted by the trial court. The Chief Justice of the Supreme Court of this state had absolute power, in his discretion, to make any order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may deem just.

Equity Rule 74 of this Court reads as follows:

> "When an appeal from a final decree, in an equity suit, granted or dissolving an injunction, is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

Our construction of this rule and our understanding of the equity practice is that the matter of a supersedeas bond is wholly discretionary, and that in view of the exemption by the statute of the state, heretofore quoted, in favor of municipalities, the Chief Justice, in granting the writ of error, had full power and exercised sound discretion in dispensing with the supersedeas bond. The solvency of the City of Englewood is in no wise questioned by counsel for the defendant in error. It is, therefore, like all other cities, able in the proper proceedings to respond in any damages which the defendant in error may suffer.

We, therefore, submit that the motion to vacate the supersedeas should be denied.

Respectfully submitted,

L. F. TWITCHELL,
S. D. CRUMP,
H. C. ALLEN,
Solicitors for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 374.

THE CITY OF ENGLEWOOD,
PLAINTIFF IN ERROR,

VS.

THE DENVER AND SOUTH PLATTE RAILWAY COMPANY,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

The defendant in error respectfully submits that the brief and argument of the plaintiff in error filed herein does not conform to the second section of paragraph 2 of Rule 21 of this Court in this: that there is no specification of the errors relied upon although the record discloses that there were ten assignments of error to the decision of the Supreme Court of the State of Colorado.

STATEMENT OF THE CASE.

Inasmuch as there is practically no statement of the case made by the plaintiff in error in its brief herein, we shall explain very briefly the facts involved.

The City of Englewood, plaintiff in error, is a city incorporated under the general laws of the State of Colorado. It is a suburb adjoining the city of Denver, but in a different county. The street car lines of Denver are owned by The Denver City Tramway Company, which will hereafter be designated as the Tramway Company. One of its lines runs from Denver to a point near the center of the City of Englewood. At this point the line of the defendant in error commences and extends farther outward, serving two outlying suburbs of Denver. In the year 1906 the City of Englewood, by ordinance, granted to the defendant in error, or more correctly to its predecessors, a franchise under which it constructed and operated its line in so far as it lay within the City of Englewood. The ordinance granting the franchise contains a provision (Section 6) to the effect that the defendant in error should charge a fare of five cents per passenger, and a half fare or two and one-half cents for children between the ages of six and twelve years, and that tickets should be sold by the defendant in error which would entitle persons boarding the cars of the defendant in error within certain limits (these limits, as we understand, being the outer boundary of the territorial limits of the City of Englewood) to transfer to the cars of the Tramway Company running to Denver without the payment of extra fare, and also permitting passengers to transfer from the Tramway lines to the

line of the defendant in error without extra fare. In short, the ordinance required that the passengers of the defendant in error within the territorial limits mentioned should be entitled to the transfer privilege with The Denver City Tramway Company, a separate and distinct corporation.

Efforts were made by defendant in error to effect an agreement with The Tramway Company for the division of receipts from transferred passengers, but The Tramway Company, it appears, refused to enter into any agreement except such a one as would enable it to receive the full fare of the transferred passenger, leaving nothing whatsoever for the services rendered in such cases by the defendant in error. The defendant in error, however, continued to perform this service without remuneration until the Twenty-eighth day of October, 1914, at which time it discontinued this service and required the payment of fare without transfer privilege from all passengers, upon this ground or justification: In the year 1913 the Legislature of the State of Colorado enacted a law creating a public service commission known as The Public Utilities Commission of the State of Colorado, vesting in that Commission jurisdiction over various public utilities (including street railway lines) with the power, among other things, to fix and determine rates and service. This statute provided that all public utilities within the jurisdiction of the Commission should file with the Commission a schedule of their rates or fares; that unless these rates and fares were modified within thirty days they should become the established rates and fares of the utility in question until such a time as they were modified in the manner provided by the

statute. Pursuant to this statute, the defendant in error, on September 28, 1914, filed a schedule of rates or fares with the Public Utilities Commission wherein it specified a fare of five cents for each adult passenger and two and one-half cents for each child between the ages of six and twelve years. This included passengers within the limits of the area designated by the ordinance of the City of Englewood. It eliminated the privilege of transferring without additional fare to and from the line of The Tramway Company. No modification was made of this schedule within the thirty day period provided by the statute. Whereupon these fares became the established fares and went into operation on the twenty-eighth day of October, 1914.

Almost immediately thereafter the City of Englewood commenced an action in the District Court of the State of Colorado against the defendant in error. In its Bill of Complaint it alleges the enactment of the ordinance granting the franchise wherein was contained the provisions concerning fares and the transfer privilege hereinbefore mentioned and the refusal of the defendant in error to abide by the terms of said ordinance; alleging further,

> "But notwithstanding the terms and conditions of said section 6 (of the ordinance) and the duties and obligation thereby imposed upon the defendant, the said defendant company did on or about the date last aforesaid (October 28, 1914), and in violation of its said contract so entered into in the said Ordinance, refused either to provide coupon tickets to the citizens of the said city and others

desiring to be transferred from or to the street intersections named aforesaid from or to the cars of the said The Denver City Tramway Company, and refused, and still does refuse, to transfer said passengers to or from any of the said street intersections, without the payment of the sum of five cents in addition to the fare collected by the said The Denver City Tramway Company."

The bill also alleges:

"That in order to enforce the rights of the inhabitants and citizens of the plaintiff, under and pursuant to the terms of said Section 6 of said Ordinance, excepting by this proceeding, a multiplicity of suits and actions would be required, and the citizens of said City have no speedy or adequate remedy at law in order to enforce the contract contained in said Ordinance, and especially that portion thereof contained in said Section 6."

An injunction was prayed restraining the defendant, its officers, etc., from violating the terms and conditions of the section of the ordinance referring to fares and transfer privileges.

A temporary injunction was issued upon the application of the plaintiff containing, among other things, the following:

"And the said defendant Company, its officers, agents, servants, or employees are hereby required and commanded in all respects to comply with the terms and conditions of said section 6 of said Ordinance, and

in some proper and reasonable way to provide means whereby all persons who have taken passage upon the cars of the defendant Company between Quincy Avenue and Hampden Avenue in the City of Englewood, going north, to be transferred and transported upon the cars of the said The Denver City Tramway Company, without any further charge or fare than the sum of five cents for such continuous passage. And also, in some proper and reasonable way to provide means whereby all passengers going south upon the cars of the said The Denver City Tramway Company shall be transferred to the cars of the defendant Company, thence transported without extra charge to any street intersection in the City of Englewood between the said Hampden Avenue and Quincy Avenue, inclusive."

It is worthy of note that The Denver City Tramway Company was not a party to this proceeding. It therefore follows that the duty or burden of making and performing the arrangement with the Tramway Company for the transfer of passengers under the order of court devolved upon the defendant alone.

In due time the defendant answered, alleging, among other things, that it had filed with The Public Utilities Commission of the State of Colorado its schedule of rates and fares as required by law, which had not been suspended or modified, and which thereupon became effective on the Twenty-eighth day of October, 1914.

The answer alleged further, in substance, that the Tramway Company refused to divide the receipts from the fares of transferred passengers with the result that the terms of the ordinance, in effect, required the defendant to carry passengers within the defined limits gratuitously contrary to the provisions of the Public Utilities act of the State of Colorado. It further alleged that the plaintiff has a full, speedy, and adequate remedy at law under the Public Utilities act of the State of Colorado in a proceeding or proceedings brought before The Public Utilities Commission.

To this answer the plaintiff demurred upon the ground that the answer failed to state facts sufficient to constitute a defense in the following particulars, among others:

> "a. That it affirmatively appears from said * * * answer, that said section six of the ordinance set forth in the complaint herein, has been from its passage until the present time, construed by both parties hereto, to mean, that the defendant will provide for the carriage of passengers between the points designated in said section six, who come from or desire to travel upon the lines of the Denver City Tramway Company, without extra fare; and that the manner of providing such transportation, was not considered by the parties hereto as at all material in carrying out the intent of the ordinance.
>
> b. That it affirmatively appears from said further defense that it is perfectly pos-

sible and feasible for the defendant to comply with the spirit and intent of said section six, either by the issuance of said coupon tickets or otherwise, and to so provide for the transportation of passengers, between the points named, without any extra fare, other than that charged on the line of the said The Denver City Tramway Company.

c. That it is immaterial, and constiutes no defense to the cause of action in the complaint herein, that the defendant is unable to receive any compensation for carrying said passengers, without charging any extra fare for transportation over its line of railway, through the town of Englewood.

d. That it is immaterial, and does not constitute a defense to the cause of action herein stated, that the defendant is unable to make a profit or make any compensation whatsoever for carrying the passengers, included within the terms of said section six of said ordinance, over its line of railway in accordance with the provisions of said section six of said ordinance.

e. That it is immaterial whether or not the defendant filed with the Public Utilities Commission of the State of Colorado, its schedule of rate as in said answer set forth, as the filing of said schedule of rate is not a defense to the cause of action set forth in said complaint herein, alleging a violation of the terms and provisions of said section six of the ordinance and contract between the

> plaintiff and the defendant, and because the rates and duties of the defendant were permanently fixed by the terms of said section six."

The demurrer to the answer was sustained. The defendant elected to stand upon its answer. Whereupon, judgment was given in favor of the plaintiff and the temporary injunction made permanent.

A writ of error issued from the Supreme Court of the State of Colorado on application of defendant. The Supreme Court of Colorado reversed the judgment of the District Court and ordered the suit dismissed. This opinion will be more fully reviewed later in this brief. Suffice it to say, the court, after reviewing the facts substantially as hereinbefore stated, and reviewing the statutory law of the State of Colorado and various decisions bearing upon the question, concludes:

> "We must hold therefore, that at the time of the adoption of the ordinance in question, the town of Englewood, was without express legislative power to fix rates or regulations for public utilities and that its contract with the defendant company, was subject to the legislative power afterward asserted, by the enactment of the Public Utilities Statute.
>
> It follows therefore, that the power to regulate the rates of the public utility in question, is vested by the act exclusively in the Public Utilities Commission. The law provides that every order or decision made

by the Commission, may be reviewed by the Supreme Court upon the application of either party, or of any person pecuniarly interested in the utility, for the purpose of having the lawfulness of the order or revision determined.

Hence, and for the reasons stated, the plaintiff below had by reason of the provisions of the Public Utility Act, a plain, speedy and adequate remedy at law for the determination of its grievance."

Two Judges of the Supreme Court dissented, their dissenting opnion being written by the Chief Justice.

Writ of error was issued upon the application of the plaintiff below, and, as we have previously stated, an assignment of error was filed alleging error in ten particulars. Plaintiff in error does not specify the errors upon which it relies. Its argument seems to be reduced to two propositions, first, that the question involved "cannot be viewed as a rate fixing proposition; that it is a contractual relation between the city and the utility upon certain terms and conditions as defined in the ordinance of 1906;" and secondly, "That even though it were to be held to be a rate fixing question between the parties litigant, then, in that event, the decision of the Supreme Court of Colorado is in error for the reason that it impairs the obligations and terms of a solemn and binding contract contrary to the provisions of the federal constitution."

Should the court be of the opinion that this statement of the plaintiff in error and the argument in sup-

port thereof is a sufficient specification of error, we respectfully submit:

First: That the first proposition advanced, that is, that the question does not relate to the fixing of rates, but to a contractual relationship, is not in any sense a federal question, and therefore, taken alone, is not proper to be considered by this court.

Second: That the second proposition, that is, that if this suit does involve the question of fixing rates of a public utility, then, in that event, the decision of the Supreme Court of the State of Colorado is in error for the reason that it impairs the obligations and terms of a solemn and binding contract contrary to the provisions of the federal constitution, was not properly presented to nor determined by the Supreme Court of the State of Colorado unless it be considered as involved incidentally because of the position taken by that court.

Third: We submit that the position of the Supreme Court of the State of Colorado is correct in any event.

ARGUMENT.

It is difficult to understand the argument for counsel for plaintiff in error wherein they state that this case does not involve the question of fixing the rates of a public utility, but rather the contractual relationship between the city and the public utility, or the alternative that, if the case does involve the fixing of rate, then the decision of the Supreme Court of Colorado is erroneous in that it impairs the obli-

gation of a contract contrary to the provisions of the Federal Constitution. Obviously there is but one federal question, if any, presented, and that is the impairment of the obligation of the contract. However, inasmuch as the plaintiff in error insists in its first proposition that this suit does not involve the question of rates, we wish to consider it briefly although it seems to be beyond question. The ordinance of the City of Englewood which authorized the defendant to charge the five cent fare required that tickets be sold at that rate which would entitle the passenger to transfer onto the Tramway lines without additional fare, and also that passengers from the Tramway would be transferred to the line of the defendant in error without additional fare. As a matter of practice this plan was worked out by giving the passenger a transfer ticket. The rate established by The Public Utilities Commission eliminated the transfer privilege. The result is that the passenger transferring from one line to another was required to pay fare on both lines. This action was commenced to require the defendant in error to continue the transfer privilege without the payment of the extra fare. In other words, to require the defendant to transport the transferred passenger in connection with the Tramway line for one fare, all of which went to the Tramway Company instead of two fares, which the rates established by the Public Utilities Commission permitted. Now how can it be said that this is not a question of rates? Moreover, the Supreme Court of the State of Colorado expressly treated this suit as one involving the question of rates and fares, and the right of the State, through its Public Utilities Commission, to fix rates and fares

of Public Utilities even to the extent of overturning contracts previously made, as in this case, between the city granting the franchise and the utility in question.

THE FEDERAL QUESTION WAS NOT PROPERLY PRESENTED NOR PASSED UPON IN THE STATE COURT.

This is a writ of error to the Supreme Court of the State of Colorado. We understand the rule to be that a federal question must have been presented and necessarily determined. A review of the original pleadings in this case fails to disclose any reference to any federal question, except possibly inferentially. The nearest approach seems to be in the Demurrer to the Answer, subdivision "e", wherein it is stated "That it is immaterial whether or not the defendant filed with The Public Utilities Commission of the State of Colorado, its schedule of rate as in said answer set forth, as the filing of said schedule of rate is not a defense to the cause of action set forth in the complaint herein, alleging a violation of the terms and provisions of said section six of the ordinance and contract between the plaintiff and the defendant, and because the rates and duties of the defendant were permanently fixed by the terms of said section six."

Even this does not squarely present a federal question, because under that statement it could be argued, and in fact was, that under the law of the State of Colorado alone the contract entered into between the city and the utility could not be overridden by the Act of the Public Utilities Commission.

A review of the opinion of the Supreme Court and also of the dissenting opinion fails to disclose any specific reference whatsoever to any federal question. The opinion of the court may be summed up as follows: That at the time of the adoption of the ordinance granting the franchise to the defendant in error, the City of Englewood was without express legislative power to fix rates or regulations for public utilities, and that its contract with the defendant was subject to the legislative power of the State in that regard, afterwards asserted through the Public Utilities Commission. That the power to regulate rates of the public utility in question is vested exclusively in The Public Utilities Commission. That the City of Englewood had a full, complete, and adequate remedy at law under the Public Utilities Act, and that the order of that Commission was subject to review by the Supreme Court of the State. It is true that, in a number of cases relied upon by the Supreme Court of Colorado, as authority for the position taken, the question of the inviolability of a contract was involved, but these cases are cited as authority for the Court's position rather than as a determination of any federal question. If we turn to the dissenting opinion we find there no reference to any federal question, but rather a statement that, in the opinion of the dissenting judges, the city did have power to make the contract in question and that its right in that regard was not impaired by the later legislative action of the State, and that, inasmuch as the contract was binding, that the proceedings in question were proper in order to enforce it.

Now it must be admitted that the effect of the decision of the Supreme Court of Colorado is to subordinate the contract made between the plaintiff and defendant to the action of the State, through its Public Utilities Commission, and it may well be argued that the obligation of that contract is impaired, but the question, so far as the printed record here discloses, was not presented to the Supreme Court of the State in that light; neither did it arise necessarily, nor was it passed upon by the Supreme Court of the State. We understand it to be the rule that, although the question might have been involved, and although it may be involved inferentially, nevertheless, unless it was necessarily involved and determined it does not present a case of which this court can take cognizance.

If any matters outside of the printed record in this court may properly be considered, reference may be made to the petition for rehearing in the Supreme Court of Colorado. We are not advised of the reason for the elimination of this petition from the printed record in this court. We assume, however, that it forms a portion of the record as filed. At any rate, after the decision of the Supreme Court of Colorado, a petition for rehearing was filed by the plaintiff in error here, defendant in error there, wherein for the first time is there any specific reference to a federal question. There are nine specifications, each directed to the theory that the Supreme Court of Colorado was in error. All but one of these deal with questions pertaining solely to the law of the State. One only, the second, raises a federal question. It reads:

> "The opinion of the court is erroneous in that it is in direct violation of Article 1, Section 10 of the Constitution of the United States which declares: 'No state shall * * * pass * * * any law impairing the obligation of contracts * * *.'"

We believe that a fair interpretation of the proceedings up to the time of the filing of this petition for rehearing leads to the conclusion that not until this time was there any thought of raising a federal question.

The ruling of the Supreme Court appears in the printed record at page 27. It reads:

> "The court having considered the arguments of counsel upon the petition for a rehearing in this matter, and being now well advised in the premises doth order that said petition be and the same is hereby denied."

We understand the rule to be that the federal question cannot be raised for the first time in a petition for a rehearing in the state court unless in the consideration of that petition that court rules upon the federal question in denying the application. There are numerous cases upon this point, but one citation will suffice. In McCorquodale vs. State of Texas, 211 U. S., 432, a writ of error issued to the Court of Criminal Appeals of the State of Texas. In a petition for rehearing in the state court a federal question was raised for the first time. The state court denied the petition in the following language:

"This cause came on to be heard on appellant's motion for a rehearing, and the same being considered by the court said motion is overruled."

In the opinion of this court it is said (page 437):

"This court has decided many times that it is too late to raise a federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision (cases cited). It is true that we have also decided that if the court entertains the motion and passes on the federal question, we will review its decision. But it must appear that the court has done so (cases cited). It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion. Writ of error dismissed."

THE DECISION OF THE STATE COURT CORRECT IN ANY EVENT.

Regardless of the conclusion of the court on the foregoing points, we submit:

That the decision of the Supreme Court of Colorado is entirely in accordance with the law upon this subject. The City of Englewood is incorporated under the general law of the State of Colorado. No question involving a freehold or constitutional charter is here

involved. The statutes of the State of Colorado pertinent to the power of towns and cities to grant franchises to public utilities of this character are referred to in the opinion of the Court. Section 6676, Revised Statutes of Colorado, 1908, reads as follows:

> "No franchise or license giving or granting to any person or persons, corporation or corporations, the right or privilege to erect, construct, operate, or maintain a street railway, electric light plant or system, telegraph or telephone system, within any city or town, or to use the streets or alleys of a town or city for such purposes, shall be granted or given by any city of the first or second class or by any incorporated town in this State in any other manner or form than by an ordinance passed and published in the manner hereinafter set forth."

The Supreme Court of the State found that the sole power of towns and cities in this regard is found in this section and "That the legislature had conferred no specific power upon the town of Englewood to enact a rate-making ordinance." However, this court has held that "The discharge of the duty imposed upon it by the Constitution, to make effectual the provision that no state shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the states." (Quotation from Milwaukee etc. Company vs. Railroad Commission, 238 U. S., 174, 182.)

Therefore, we wish to review a constitutional and a further statutory provision from which it is insisted in the dissenting opinion, powers are granted cities or towns to enter into binding contracts with public utilities concerning rates and fares. Sec. 11, Article XV of the Constitution of Colorado reads:

> "No street railroad shall be constructed within any city, town, or incorporated village without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad."

Section 6677, Revised Statutes of Colorado, 1908, reads:

> "Any person or persons, corporation or corporations desiring to secure a franchise or license for any of the purposes in Section 1 hereof named (Sec. 6676 above quoted) shall cause a notice of his, its, or their intention to apply to the board of trustees of any incorporated town or city council of any city of the first or second class for the passage of an ordinance granting such franchise or license, to be published in a newspaper of general circulation published in such city or town, for a period of not less than two (2) weeks in cities of the first or second class, and of not less than ten (10) days in incorporated towns, immediately prior to the next regular meeting of the board of trustees or city council, at which it is intended to apply for the passage of the ordinance granting or

giving such franchise or license; and such notice shall specify the regular meeting of the board of trustees or city council at which it is intended to apply for such franchise or license, the name or names of the applicant or applicants therefor, a general description of the rights and privileges to be applied for, and the time for and terms upon which such franchise or license is desired. Such publication to be daily if there be a daily paper of general circulation published in such city or town, otherwise to be a weekly paper of general circulation, if any, published in such city or town; Provided, That if there be no newspaper of general circulation published within the city or town, then and in such case, such notice may be published by posting copies thereof in six (6) public places for the same length of time."

It occurs to us in this connection that another provision of the State Constitution is pertinent to be considered, although it was not mentioned by the Supreme Court of Colorado. It is Section 8, Article XV, which reads:

"The right of eminent domain shall never be abridged nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals; *and the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such*

> ***manner as to infringe the equal rights of individuals or the general well-being of the state."***

The further statutory provision, Section 5420, Revised Statutes of Colorado, 1908, provides:

> "Nothing in this act contained shall be construed to allow the construction of any street or other railroad or other structure or sub-structure, for any purpose on, below, or elevated above the surface of the ground of any street or alley within the limits of such city or town by any corporation, person or persons whomsoever without the consent of the local authorities of such city or town * * *."

This last section, which appears in the chapter entitled "Railroads" in the Revised Statutes, is in harmony with Section 6676 above quoted which was referred to by the Supreme Court of this state as being the only authority for towns and cities in this regard.

We respectfully submit that there is nothing in these constitutional provisions or these sections from the statutes justifying the conclusion that the Legislature intended to grant the power to fix rates of public utilities to towns and cities, and much less can it be contended that by these sections the State intended to part with its inherent power and jurisdiction over this question and to grant irrevocably to towns and cities a power inherent in the legislative department of government.

Passing now to the statute concerning public utilities and creating the Public Utilities Commission. This statute, Chapter 127, Session Laws of Colorado, 1913, is similar to the laws of many states where public service commissions have been created. It creates The Public Utilities Commission of Colorado and vests in it general jurisdiction over the question of rates and service of various public utilities, granting generally power to fix and revise rates, either upon its own motion or upon complaint. The more pertinent sections are quoted in the opinion of the Supreme Court of Colorado.

Section 13 provides:

"(a) All charges made, demanded or received by any public utility, or by any two or more public utilities, for any rate, fare, product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such rate, fare, product or commodity or service is hereby prohibited and declared unlawful.

(b) Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just and reasonable."

Section 21 provides:

"No street or interurban railroad corporation shall charge, demand or collect or receive more than five cents for one continuous ride in the same general direction within the corporate limits of any city and county, city or town, except upon a showing before the commission that such greater charge is justified. Every street or interurban railroad corporation shall upon such terms as the commission shall find to be just and reasonable furnish to its passengers transfers entitling them to one continuous trip in the same general direction over and upon the portions of its lines within the same city and county, or city or town, not reached by the originating car."

Section 23 provides:

"(a) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, tolls, fares, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service, or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges, or classifications, or any of them, are unjust, unreasonable, discriminatory, or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges, or

classifications, are insufficient, the Commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

(b) The commission shall have the power, upon a hearing, had upon its own motion, or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices, or schedule or schedules, in lieu thereof."

May we add to this that Section 15 of the Act requires every public utility under the jurisdiction of the Commission to file, under such rules and regulations as the Commission may prescribe, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced or to be collected or enforced.

Section 16 provides:

"Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge

or classification, or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, except after thirty days' notice to the commission and the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, or classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission immediately preceding or following the item."

Section 17 prohibits the granting of free transportation except under certain conditions which are not involved here.

It will, of course, be understood that the Commission is authorized to hear complaints concerning

rates and fares and to make changes or revisions as circumstances justify. From any final order of the Commission proceedings in the nature of an appeal may be taken and the case reviewed by the Supreme Court of the State of Colorado. In short, this law afforded a full, complete, and adequate remedy for the correction of any wrong resulting from the act of the defendant in error in refusing to abide by the terms of the ordinance in question. It is to be presumed that in any hearing upon the question of the rates and fares proper to be charged by the defendant in error for the service rendered, the ordinance in question would be considered by The Public Utilities Commission in the determination of the case. We do not mean to admit that this ordinance is binding, but rather that it would be one factor to be considered by the Commission in determining the just and adequate rates for the services rendered.

The question here involved has been before this court a number of times. In some cases it has been found that the Legislature of the state in question had granted or delegated to municipal corporations the right to contract with utility companies on the question of rates and fares, and in such cases these contracts were held to be valid, the state being precluded from overriding the contract in question. Other cases involved the question of the right of one of the parties to the contract; for illustration, a municipality, to set aside its own contract with the utility company. As an illustration of this line of decisions may we note Detroit vs. Detroit Citizens Street Railway Company, 184 U. S., 368, which is cited by the plaintiff in error as authority for its posi-

tion that the contract here in question cannot be set aside by any action of the State. The case at bar, however, is radically different and is controlled by a long line of decisions, both state and federal, which recognize the distinction between cases in which the municipality has been granted the power to enter into irrevocable contracts with utility companies, and those in which the municipality either had no direct authority to enter into such a contract, or, having the power to contract, the contract was subject to revocation whenever the latent power of the state was called into action and the supervision of rates and fares undertaken. An exhaustive review of decisions upon this point would seem to be unnecessary. We believe the case at bar to be determined by the decision of this court in Milwaukee etc. Company against The Railroad Commission of Wisconsin, 238 U. S., 174. The case, similar to the one at bar, was a writ of error to the Supreme Court of the State of Wisconsin. A contract, previously entered into between the plaintiff in error and the City of Detroit concerning the fares to be charged by the plaintiff in error operating the street railway lines in that City, had been by order of the Railroad Commission, abrogated to the extent of a reduction of the fares authorized to be charged in the contract between the City and the Utility. The case is almost identical with the one at bar. We can see no substantial difference in the statutes of Wisconsin, under which the plaintiff in error claimed the city to be authorized to make the contract, from those of Colorado involved in the present case. It appears from the Milwaukee case that the statutes of the State of Wisconsin authorized any municipal corporation

or any county to grant to any proper corporation or to any person, who had the right to construct and maintain street railways, the use, upon such terms as the proper authorities shall determine, of any streets, parkways, or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, etc. Another section of the statutes authorized consent by municipal authorities to the use of streets upon such terms, subject to such rules and regulations and the payment of such license fees as the council or board may from time to time prescribe.

Under the authority of these statutes, the City of Milwaukee, by ordinance enacted, had granted unto the plaintiff in error a franchise requiring certain service at specific rates of fare. Thereafter, these rates had been reduced in a proceeding brought by the City itself before the Railroad Commission of the State of Wisconsin. An action was brought in a state court to enjoin the Railroad Commission from enforcing its order in this respect, where it was held that there was no contract made by the passage and acceptance of the ordinance. Upon appeal to the Supreme Court of Wisconsin this judgment was affirmed, three judges holding that the statute, upon which the plaintiff relied as conferring authority upon a municipal corporation to make the contract involved, did not authorize the making of a contract which would prevent the future exercise of the authority of the state to regulate rates and fares. A fourth judge held that under the Constitution of the State there was no power to delegate to municipal corporations authority to make irrepealable contracts respecting

rates. Two judges dissented on the ground that the contract was irrepealable and was violated by the subsequent act of the Legislature in creating the Railroad Commission.

Writ of error was sued out upon the application of the Railroad Company to the Supreme Court of the State of Wisconsin, and this court reviewed at length the statutes and the ordinance under consideration and numerous decisions upon the question, holding, among other things (page 180):

> "The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the state, and while the right to make contracts which shall prevent the state during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed."

Again (page 184):

> "In view of the weight which this court gives in deciding questions involving the construction of legislative acts to decisions of

the highest courts of the states in cases of alleged contracts, and our own inability to say that this statute unequivocally grants to the municipal authorities the power to deprive the legislature of the right to exercise in the future an acknowledged function of great public importance, we reach the conclusion that the judgment of the Supreme Court of Wisconsin in this case should be affirmed."

May we also quote from Home Telephone and Telegraph Company vs. Los Angeles, 211 U. S., 265 (quotation from page 273):

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court which will be referred to hereafter and we need not delay further upon this point.

It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. Detroit v. Detroit Citizens Street R. Co., 184 U. S., 368, 382; Vicksburgh v. Vicksburgh Water Works Co., 206 U. S., 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. (Numerous cases cited.)"

In Wyndotte County Gas Company vs. State of Kansas, 231 U. S., 622, a writ of error issued to the Supreme Court of Kansas to review a decree enjoining the gas company from charging domestic consumers of natural gas in excess of the statutory rate. It appears that the city had, by ordinance, entered into a contract with the plaintiff in error, from which it was contended the rates were fixed inviolably and that a later statute fixing the maximum amount which might be charged, except with the consent of the Public Utilities Commission, violated this contract, and that the contract relieved the plaintiff in error

from any necessity of seeking the establishment of a higher rate than that fixed by the statute.

The statutes of the State of Kansas under which the city was authorized to enter into the contract are reviewed at length. They are somewhat complicated, but as we understand, they authorize the granting of a franchise by ordinance and the fixing of maximum rates, which at all times should be reasonable and just and sufficient to yield a certain net return to the utility. Under these statutes the contract in question had been made, and later the legislature enacted a law fixing the maximum rate which should be obtained in all cases unless the Utility Commission of the State should consent to a higher rate.

In passing, may we suggest that the statutes of Kansas, under which the contract in question was made, appear to us to lend themselves more strongly to an argument—that the city was authorized to contract inviolably, than do the statutes of the State of Colorado. Nevertheless, in the Wyndotte case this court holds that these statutes did not admit of the construction contended for by the plaintiff in error and affrms the decision of the State court sustaining the statutory rates regardless of the contract.

May we also refer to Puget Sound Traction, Light and Power Company vs. Reynolds, et al., constituting the Public Service Commission of the State of Washington, 244 U. S., 574. This case involves several questions, including the one presented here. Suffice it to say, that the court holds, in line with the decisions which we have heretofore cited, that it is well settled that a municipality cannot, by contract, fore-

close the exercise of the police power of the state concerning rates and fares unless clearly authorized to do so by the supreme legislative power. It is held that municipalities in the State of Washington had not been given such power and therefore the rates established by the Public Service Commission of that State were valid even though conflicting with a contract previously entered into between the City and the utility. May we suggest in passing, that while three judges of this court dissented from the majority opinion in this case, this dissent is upon grounds clearly distinguishable from the question involved in the present case?

Other decisions of this court might be cited. Moreover, there are numerous decisions from state courts. These, of course, are not conclusive of the question before this court, but they are nevertheless interesting. May we refer to the following wherein the rule has been adopted in harmony with the decision of this court in the Milwaukee case above cited, that is, that the contract between the municipality and the utility must yield to the superior power of the state unless the state has, beyond question, delegated authority to the municipality power to fix and regular rates.

City of Benwood v. Public Service Commission, 75 W. Va., 127; 83 S. E., 295.

State ex rel. Webster v. Superior Court, 67 Washington, 37; 120 P., 861.

City of Manitowoc v. Manitowoc & Northern Construction Co., 145 Wis., 13; 129 N. W., 925.

Minneapolis, St. Paul etc. Railroad Co. v. Menasha Wooden Ware Co., 159 Wis., 130; 150 N. W., 411.

City of Woodburn v. Public Service Commission of Oregon, a recent case decided by the Supreme Court of Oregon. We cannot give the citation in the official reports. It is found, however, in 161 Pac., 391.

And the following federal cases:

Seattle Electric Company v. City of Seattle et al., 206 Federal, 955.

California-Oregon Power Co. vs. City of Grants Pass et al., 203 Federal, 173.

Numerous other cases might be cited. Many of these are referred to in the opinion of the Supreme Court of Colorado. It appears to be unnecessary to make a further review of them here.

Therefore, in conclusion, we respectfully submit that, regardless of the questions which pertain more particularly to procedure which we have raised in this brief, upon the merits alone the decision of the Supreme Court of Colorado is correct for the reason that the statutes of the State do not lend themselves to a construction to the effect that the State had granted unto municipalities the power to enter into inviolable contracts concerning rates and fares to be charged by street railway companies. Conceding, for the sake of argument, that the city had authority originally to

enter into the contract in question, nevertheless such a contract is subject to revocation or modification whenever the State sees fit to exercise its inherent police power in the matter of fixing or revising rates and fares of street railway companies.

We respectfully submit that the decision of the Supreme Court of the State of Colorado should be affirmed.

FRED FARRAR,
Attorney for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 889.

THE CITY OF ENGLEWOOD, PLAINTIFF IN ERROR,

vs.

THE DENVER & SOUTH PLATTE RAILWAY COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

In 1906, the City of Englewood passed an ordinance granting to the predecessors of The South Platte Railway Company a franchise, whereby said individuals or their successors or assigns were empowered to construct, maintain and operate a street railway on the streets of the municipality. Among other provisions of the franchise, and one of the considerations therein was to the effect that coupon tickets should be issued entitling passengers going north, at or north of Quincy Avenue (formerly called Breen Avenue) to be transferred to the cars of The Denver City Tramway Company at Hampden Ave-

nue (formerly called Sheridan Avenue) and transported without extra charge; and also entitling passengers going south on the cars of The Denver City Tramway Company to be transferred to the cars of the grantees of said franchise, and transported upon presentation of said coupon ticket, without extra charge, to the intersection of any street between Hampden Avenue (formerly called Sheridan Avenue) and Quincy Avenue (formerly called Breen Avenue).

The Supreme Court has taken the erroneous view that the issue herein is one of a rate fixing proposition with reference to the transportation of passengers over the line of the defendant in error, but in no sense can it be held to be such. The condition of the ordinance, insofar as it effects this litigation, is as follows:

> "Sec. 6. Said grantees, their successors or assigns, shall have the right to charge persons riding on said cars, five (5) cents for a single passage between said termini, provided that children under six (6) years of age, when accompanied by a paying passenger, shall be carried free of charge; and children over six (6) years of age and under twelve (12) years of age shall be carried at half fare, and half fare tickets shall be on sale by the conductor on all cars; and provided further, that said grantees, their successors or assigns, shall provide by reasonable regulation for the sale of coupon tickets, which shall entitle passengers tak-

ing passage on the cars of said grantees, their successors or assigns, going north on said Broadway at or north of Quincy Avenue (formerly called Breen Avenue) to be transported the same as regular Tramway passengers, without extra fare, upon the cars of The Denver City Tramway Company at Hampden Avenue (formerly called Sheridan Avenue) and also entitling passengers going south on the cars of The Denver City Tramway Company, to be transported upon the cars of said grantees to the intersection of any street between Hampden Avenue (formerly called Sheriden Avenue) and Quincy (formerly called Breen Avenue), the latter inclusive avenue without additional fare upon presentation of said coupon ticket,"

This contract was entered into between the predecessor of the defendant in error, upon a valid and valuable consideration, viz., the right on the part of the Railway Company to occupy the streets of the City of Englewood for the purpose of laying its tracks and operating its road for profit. That this was a contract squarely within the right of both parties to make, cannot of course be denied. It violated no law and was opposed to no public policy. Valuable and perpetual rights were surrendered by the municipality to the perpetual use of the corporation. These rights were property rights, which belonged to the people and never would have been surrendered save upon the

conditions named in this contract. The City of Englewood and its citizens have, as appears from the record, faithfully complied with their part of the contract; the Railway Company now by this proceeding seeks to repudiate its part of this solemn agreement, and the majority of our Supreme Court has held that they may do so. It must be plain, it seems to us, first, that this contract is in no sense a rate fixing agreement; and second, that if so, under our law, it is an agreement which cannot be impaired without doing violence to the constitutional rights of the plaintiff in error. It is not sought by the Railway Company now to increase its charge of five cents for a single passage between the points designated in the contract; it is sought, however, to overturn and nullify that part of this contract wherein it is agreed that the company shall transport, or cause to be transported, passengers free of charge, upon the cars of another company, viz., those of The Denver City Tramway Company, to certain connections, and it provides that coupons may be furnished by the defendant in error, entitling such passengers to the privilege named. Surely, there was no law, and can be none, which could deny the power in the contracting parties to make this provision. The condition applied to all classes of people, similarly situated. It is not a contract of special privilege, and violative of any known legal principle. It states precisely the same as that condition in every franchise where public utilities agree to furnish to schools, municipal buildings and the like, water, light or power, absolutely free of charge. This reservation to the public is frequently the moving cause of granting valuable rights to private concerns.

The theory of the Railway Company, as will be seen from an examination of the original brief filed, was that this provision violates a subsequent legislative act which denied the right of common carriers, etc., to grant passage or free transportation. That theory was the one upon which the cause was tried in the District Court. Later on, the so-called Public Utilities Commission of Colorado, appointed under the statute, with powers, and charged with the duty of standing between avarice of utility corporations and the public, threw itself in the breach as a special advocate of the Railway Company, and became and ever has been a partisan, represented in the trial of the case in the Supreme Court by the then Attorney General of the State, who now represents the Railway Company since his term of office expired. This jealousy on the part of this so-called railway commission of its powers, simply illustrates the danger of stripping from the courts their constitutional and inherent power in such matters, and submitting these great questions to laymen, who have been appointed in these rate fixing plans. It is a dangerous power, if the legislature may, through whim or caprice, establish these lay courts, and at a stroke of the pen transfer the power of courts of equity to their tender mercies, and deny to litigants the right to proceed under the law, in the proper tribunal in accordance with settled and unquestioned practice.

As we view it, the law is that both parties to a solemn obligation of this sort are bound to comply with its terms. It would be as unjust for the people of Englewood to attempt to overturn this agreement

and to procure some incompetent board to take action resulting in the bankruptcy of a railway company, holding this franchise, as it is for the Railway Company to seek to evade its solemn agreement. Courts ought not to be swift to turn their backs upon precedents so well grounded in conscience and equity.

Therefore, we repeat that this section is in no wise, as to the transfer of passengers and the delivery of these coupons, a rate fixing matter. There is no rate involved. The rate of five cents per fare is fixed by the section and the provision for the coupons and transfer is entirely outside and beyond that.

However, should it be held that the matter falls within the rule of fixing rates, nevertheless this contract cannot be overturned in the manner insisted upon by the defendant in error. If it is a mixed question of rates and other obligations, the same result follows.

VIOLATION OF THE FEDERAL CONSTITUTION.

Section 10 of Article I of the Constitution provides, *inter alia*, that no state shall pass any law impairing the obligation of contracts. That the act of the General Assembly of the State of Colorado of 1913, known as the Public Utilities Act, if given the construction placed upon it by the majority of the State Court, is a direct and flagrant violation of this constitutional inhibition. Among the numerous cases sustaining our view, we beg to cite and quote as follows:

In the case of Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commissioners et al., the Supreme Court of New Jersey, in 99 Atlantic 395, 398, used the following language:

> "Such a contract neither party can violate without the consent of the other. Should the company apply to the utility board to have the rate of fare increased, it would undoubtedly be met with its contract.
> * * *
>
> The effect then of this ordinance, with its acceptance and action thereunder by the trolley company, being to constitute a contract between the company and the municipality, it is incompetent for the Board of Public Utility Commissioners, just as it is incompetent for the municipality itself, to violate that contract by imposing upon the company an additional burden, the effect of which is to require it to carry passengers for the same fare, not to, but beyond Cookman Avenue."

In Reed v. Inhabitants of Trenton, 80 N. J. Eq. 503-506, 85 Atl. 270, 271, the Court said:

> "That a municipality, as a condition precedent to granting permission to a traction company to construct and operate a street railway within its corporate limits, has power to impose lawful restrictions in the interest of the public, that regulations of rates of fare are properly classed among such restrictions and come within the terms

of the statute, and that the acceptance of such an ordinance by the company constitutes a contract are too well settled to require discussion. The contract thus entered into is evidenced by the terms of the ordinance and is to be construed by the ordinnary rules of law applicable to that subject."

The Supreme Court of Michigan in City of Detroit v. Detroit United Ry. Company, 139 N. W. 61, used this language:

"It is unquestionably the law, as a general proposition, that in purchasing the Greenfield and Fairview lines respondent acquired all rights originally granted by the franchises for such lines; and it is equally a general rule of law, that those rights once granted and accepted, could not be destroyed or abridged by subsequent, general or local legislation. * * *

It is only a question of whether respondent has, by contract with the city, obligated itself not to collect more than a five cent fare in a certain zone where, were it not for such contract, it would be authorized so to do under said township franchises."

The Supreme Court of Illinois in Peoria Ry. Co. v. Peoria Ry. Terminal Company, 96 N. E. 692, said:

"The privilege to use the public streets of a city or town, when granted by ordinance, is not always a mere license, revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license, and becomes a binding and valid contract; and the same result is reached where, in case of a mere license, it is, prior to its revocation, acted upon in some substantial manner, so that to revoke it would be inequitable and unjust. Chicago Municipal Gaslight Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; City of Belleville v. Citizens' Horse Railway Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; People v. Blocki, 203 Ill. 363, 67 N. E. 809; City of Chicago v. Chicago & Oak Park Elevated Railroad Co., 250 Ill. 486, 95 N. E. 456."

In Southern Bell T. & T. Co. v. City of Mobile (Alabama), 162 Federal Rep. 532:

"I think that the ordinances invoked by the complainant in this case are in their nature and terms contracts, in the adoption of which, the city was not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of said ordinance was, not to govern its inhabitants, but to obtain a private benefit for the city itself and its inhabitants. Ill. Trust & Savings Bank v. The City of

Arkansas, *supra;* 1 Dill. Mun. Cor., Sec. 27. A right of way upon a public street, whether granted by act of the legislature or ordinance of a city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts."

In City of Walla Walla v. Walla Walla Water Company (Washington), 19 Supreme Ct. Rep. 81:

> "It is sufficient for the purposes of this case to say that this court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it."

In the case of Borough of North Wildwood et al. v. Board of Public Utility Commissioners, as quoted in 95 Atlantic 750, the question in point was not raised, but by innuendo the Supreme Court of New Jersey intimates the general authority on this proposition by the following language:

> "This, however, does not help the prosecutors; for while the municipality itself has not assented to a change in rate,

> the state, its creator and parent, has done so through a specially constituted agency. If the water company were here complaining that its contract rights were being impaired, a different question would be presented; but the contract rights of one of the state's creatures may be waived by the creator. As was said in Cortelyou v. Anderson, 73 N. J. Law 427, 431, 63 Atl. 1095, 1097: 'The constitutional limitations which prevent the legislature from impairing the obligation of a contract do not debar it from annulling obligations due to the public.' "

The Supreme Court of the United States in Minneapolis v. Minneapolis Street R. Co., 30 S. C. Reporter 121, said:

> "In considering the terms of this ordinance and what it undertook to accomplish on its face, we are to bear in mind that public grants of this character are not to be extended by implication, and that all that is granted must be found in the plain terms of the act. This principle has been so frequently and recently announced in this court, that it is unnecessary to cite the cases which have established it. Recognizing this principle, it must also be remembered that grants of the character of the one under consideration here, when embodying the terms of a contract, are protected by the Federal Constitution from impairment by subsequent state legislation, and notwithstanding the principle of strict construction,

whatever is plainly granted cannot be taken from the parties entitled thereto by such legislative enactments. Statutes and ordinances of this character are not to be extended by construction, nor should they be deprived of their meaning, if it is plainly and clearly expressed. * * *

Looking to the terms of the act of March 4, 1879, we find that the right to construct and maintain the street railway upon the streets of the city, with the rights and privileges as set forth and qualified in the ordinance is 'legalized and granted to said company.' Language could scarcely be plainer, and, if we are correct in construing the ordinance as granting the right and privilege of maintaining railways in the streets of Minneapolis for the charter term of fifty years, upon the terms therein mentioned, a vital part of which concerns the right of the company to charge a certain fare for passengers carried, it follows that this privilege, with the others, was vested in the company by the legislature of the State of Minnesota."

In the case of Monett Electric Light, Power and Ice Company v. Incorporated City of Monett, Mo., et al., reported in 186 Federal Rep. 364, we quote the following:

"If, therefore, the city has entered into such a contract with the complainant or its assignor, such contract is protected by the

Constitution of the United States against state legislation to impair it. And an ordinance legally adopted, accompanied by all legal requirements and properly accepted, constitutes a contract within the meaning of the Missouri statute conferring this power upon municipalities."

Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368.

"The rate of fare is among the most material and important of the terms of conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement."

* * *

Shreveport Traction Co. v. City of Shreveport, 47 So. 40.

"The power to fix rates is inherent in the government, to a reasonable extent, at least that power has been exercised at the date of the contract in this case. The transfer is a complete legal transfer in which sovereignty through the municipality appears as transferror. The same power asks to altar that which has been agreed upon. We feel constrained to disagree with the view that would lead to setting aside the

agreement. The inviolability of contracts must be maintained. It only becomes necessary to show that there is a contract in order to hold all parties bound to its faithful execution."

Omaha Water Co. v. City of Omaha, 147 Fed. 1.

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation and other public utilities partakes of the nature of a governmental power and also of that of a business power. Are the inhabitants of a city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. It is to procure water and get rates for the city and its

inhabitants. Hence it is that the Legislature of a state, unless prohibited by its Constitution, may empower a city to suspend by contract, and the city may suspend in that way during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers."

Owensboro v. The Cumberland Tel. & Tel. Company, 230 U. S. 58.

"If the grant be accepted, and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights."
the prohibitions placed in the Constitution for the protection of property rights."

Cleveland v. The Cleveland City Railroad Company, 194 U. S. 538.

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for the stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were suspended, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addi-

tion, we consider the specific reference to limitations of time which the ordinance contained, and the fact that a written acceptance by the corporations of the ordinance was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

In conclusion, we submit that this matter cannot be viewed as a rate fixing proposition; that it is a contractual relation between the city and the utility upon certain terms and conditions as defined in the ordinance of 1906. That even though it were to be held to be a rate fixing question between the parties litigant, then and in that event the decision of the Supreme Court of the State of Colorado is in error for the reason that it impairs the obligations and terms of a solemn and binding contract, contrary to the provisions of the Federal Constitution.

Respectfully submitted,

L. F. TWITCHELL,
S. D. CRUMP,
H. C. ALLEN,
Solicitors for Plaintiff in Error.

CITY OF ENGLEWOOD *v.* DENVER & SOUTH PLATTE RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 106. Submitted December 19, 1918.—Decided January 7, 1919.

An ordinance provision respecting the service to be rendered by a street car company (in this case respecting the transfer privileges to be accorded passengers,) will not be adjudged to have created a contract obligation beyond legislative control if the power of the municipality under the state law, and its intention, to create such an obligation do not clearly appear.

Writ of error to review 62 Colorado, 229, dismissed.

THE case is stated in the opinion.

Mr. L. F. Twitchell for plaintiff in error. *Mr. S. D. Crump* and *Mr. H. C. Allen* were also on the brief:

The Act of 1913, known as the Public Utilities Act, if given the construction placed upon it by the majority of the state court, is a violation of the constitutional inhibition against impairing the obligation of contracts. *Atlantic Coast Elec. Ry. Co.* v. *Public Utility Commrs.*, 89 N. J. L. 407, 413; *Reed* v. *Trenton*, 80 N. J. Eq. 503–506; *Detroit* v. *Detroit United Railway*, 173 Michigan, 314; *Peoria Ry. Co.* v. *Peoria Ry. Terminal Co.*, 252 Illinois, 73; *Southern Bell Telephone Co.* v. *Mobile*, 162 Fed. Rep. 532; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *North Wildwood* v. *Public Utility Commrs.*, 88 N. J. L. 81; *Minneapolis* v. *Minneapolis Street Ry. Co.*, 215 U. S. 417; *Monett Electric Light Co.* v. *Monett*, 186 Fed. Rep. 364; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368; *Shreveport Traction Co.* v. *Shreveport*, 122 Louisiana, 1; *Omaha Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S. 536.

Mr. Fred Farrar for defendant in error:

A federal question cannot be raised for the first time in a petition for a rehearing in the state court unless in the consideration of that petition that court rules upon the federal question in denying the application. *McCorquodale* v. *Texas*, 211 U. S. 432.

The case is controlled by a long line of decisions, both state and federal, which recognize the distinction between cases in which the municipality has been granted the power to enter into irrevocable contracts with utility companies, and those in which the municipality either had no direct authority to enter into such a contract, or, having the power to contract, the contract was subject to revocation whenever the latent power of the State was called into action and the supervision of rates and fares undertaken. *Milwaukee &c. Co.* v. *R. R. Commission of Wisconsin*, 238 U. S. 174; *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273; *Wyndotte County Gas Co.* v. *Kansas*, 231 U. S. 622; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574; *Benwood* v. *Public Service Comm.*, 75 W. Va. 127; *State ex rel. Webster* v. *Superior Court*, 67 Washington, 37; *Manitowoc* v. *Manitowoc & Northern Traction Co.*, 145 Wisconsin, 13; *Minneapolis, St. Paul &c. R. R. Co.* v. *Menasha Wooden Ware Co.*, 159 Wisconsin, 130; *Woodburn* v. *Public Service Comm.*, 82 Oregon, 114; *Seattle Electric Co.* v. *Seattle*, 206 Fed. Rep. 955; *California-Oregon Power Co.* v. *City of Grants Pass*, 203 Fed. Rep. 173.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill to compel the defendant to arrange for passengers on its road to be transported without extra fare over the line of the Denver City Tramway Company from a point of connection and in like manner for

passengers on that company's line to be carried over the defendant's line without additional charge. The defendant operates a street railway under a franchise granted by the plaintiff while a town. By § 6 of the ordinance making the grant the grantees were allowed to charge certain fares provided that they should make the arrangement stated above. The defence pleaded against being required to comply with these terms is that the Denver City Tramway Company charges five cents, the maximum fare allowed, for its part of the service, so that the defendant gets nothing, and that the defendant filed a schedule of rates with the State Public Utilities Commission which now are the defendant's established rates and charges. On demurrer the Supreme Court of the State held that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature, that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy, that it had done so, and that this proceeding should be dismissed.

Of course we do not go behind the decision of the Court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the State could confer that power. The plaintiff says that the State could not confer it since to do so would impair the obligation of a contract. Upon that point we agree with the Court below that clearer language than can be found in the state laws and this ordinance must be used before a public service is withdrawn from public control. *Milwaukee Electric Ry. & Light Co.* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, 180. The cases generally are cases where the railroad or other company sets up contract rights against the city. Whether when the railroad consents a legislature would not have all the power that the city could have to modify even a constitutionally protected contract need not be considered

here. If we deal with the present case on the merits there seems to be no sufficient reason why the writ of error should not be dismissed. It is giving the plaintiff the benefit of a very great doubt if we assume that the question on the merits was saved.

Writ of error dismissed.